

NOVEMBER-DECEMBER 2021

VOL. 21-10

PRATT'S

ENERGY LAW

REPORT



LexisNexis

EDITOR'S NOTE: DEVELOPMENTS

Victoria Prussen Spears

**FERC TO TRADERS: "THOSE WHO DO NOT
LEARN FROM HISTORY ARE DOOMED TO
REPEAT IT"**

Norman C. Bay, Paul J. Pantano, Jr., and
Alexandra K. Calabro

**U.S. OFFSHORE WIND IS POISED FOR RECORD
INVESTMENT**

Ipek Candan Snyder

**CONGRATULATIONS ON CLOSING THE BIG
INVESTMENT. DON'T MISS WHAT COMES NEXT.**

Jeffrey J. Hunter and Matthew C. Luzadder

**CHILDREN, CLIMATE, AND CONSTITUTIONAL
RIGHTS: JULIANA V. UNITED STATES**

Paul Rink, Andrea Rodgers, and Philip L. Gregory

Pratt's Energy Law Report

VOLUME 21

NUMBER 10

November–December 2021

Editor's Note: Developments

Victoria Prussen Spears 321

**FERC to Traders: “Those Who Do Not Learn From
History Are Doomed to Repeat It”**

Norman C. Bay, Paul J. Pantano, Jr., and Alexandra K. Calabro 323

U.S. Offshore Wind Is Poised for Record Investment

Ipek Candan Snyder 328

**Congratulations on Closing the Big Investment.
Don't Miss What Comes Next.**

Jeffrey J. Hunter and Matthew C. Luzadder 331

**Children, Climate, and Constitutional Rights:
*Juliana v. United States***

Paul Rink, Andrea Rodgers, and Philip L. Gregory 334

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexus.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexus.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexus.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Kirkland & Ellis LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Congratulations on Closing the Big Investment. Don't Miss What Comes Next.

*By Jeffrey J. Hunter and Matthew C. Luzadder**

The authors explain how a federal law governing foreign ownership of U.S. land may play a role in renewable energy development.

Renewable energy investments in the United States increased during the pandemic, building on the record \$55.5 billion invested in 2019. Much of this capital comes from overseas banks, pension funds, and other lenders seeking ESG-friendly investments in the U.S. market.

The companies that develop these renewable projects in this scenario may be subject to a somewhat obscure federal disclosure law, the Agricultural Foreign Investment Disclosure Act (“AFIDA”). Congress enacted this disclosure statute back in the 1970s, when the dollar fell in relation to global currencies and foreign investors snapped up farmland at bargain prices. At least, that was the law’s original purpose: to identify foreign control of U.S. farmland and to report annually to Congress.¹

Today, the Farm Service Agency (“FSA”) of the U.S. Department of Agriculture (“USDA”) is the agency that implements AFIDA in each FSA county office across the United States. AFIDA requires a “foreign person”—a term that includes foreign governments, individuals, and businesses—to file a Form 153 report within 90 days of acquiring, assigning, or disposing of an “interest in agricultural land.” A qualifying interest includes fee simple ownership or leaseholds of more than 10 years; options, security interests, and easements or rights of way are exempt. “Agricultural land” is straightforward: land used for farming, ranching, or timber production in the past five years. Completing the form is also straightforward for the most part. If you have the

* Jeffrey J. Hunter, a partner in the Washington, D.C., office of Kelley Drye & Warren LLP, focuses his practice on federal and state campaign finance, lobbying disclosure, and ethics rule compliance. Matthew C. Luzadder, managing partner of the firm’s Chicago office, focuses his practice on white-collar crime and internal investigations, commercial litigation and labor and employment law matters. The authors may be contacted at jhunter@kelleydrye.com and mluzadder@kelleydrye.com, respectively.

¹ In a rare bout of bipartisanship, the House Appropriations Committee amended the fiscal year 2022 agriculture appropriations bill to order the Secretary of Agriculture to stop companies owned by the Peoples Republic of China from purchasing agricultural land. This “Newhouse amendment” also disqualifies PRC-owned land from participating in USDA programs. And in Ohio, Governor DeWine signed SB 52, permitting county commissioners to scuttle wind or solar projects early in development (called the “kill switch”), or to ban developments in all or parts of a county’s unincorporated areas.

deed or lease, most of the information you need to report to the FSA is right there. Other bits—including the acreage of crop versus timber, etc.—may require help.

HOW COULD THIS LAW IMPACT YOUR COMPANY?

Consider the example of a Delaware corporation, headquartered in Ohio. At first blush, the conclusion is that it is not foreign, including under a “plain reading” of AFIDA. Correct, but you need to look into ownership of companies higher up in the corporate tree. If an intermediate parent entity has taken investment from a foreign source, that foreign ownership or control imputes to all subsidiaries, down to the project level entity that holds the deeds or leases.

Specifically, to cast a U.S.-formed and U.S.-headquartered company as a “foreign person,” foreign investors must have a “significant interest of substantial control.” This means either:

- One or more foreign nationals, governments, or organizations directly or indirectly hold 10 percent (by one person or, a group of persons that each own less than 10 percent but “act in concert with respect to such an interest”); or
- Multiple persons together hold 50 percent or more regardless of whether they act in concert.

HOW CAN THE FSA KNOW SO MUCH ABOUT FOREIGN OWNERSHIP?

The USDA tasks county FSA offices with enforcing AFIDA. County office staff are closer to the land and more likely to learn about a transaction, particularly when an energy company signs deals for hundreds or thousands of acres. Or, county office staff may read trade press reports of a merger or large foreign investment in a locally operating renewable energy company.

AFIDA’s reporting requirement attaches when a domestic company becomes a foreign person, or when the company changes status back to domestic. The USDA provides county FSA offices with template letters to urge apparently foreign persons to comply with the law, as well as instructions for reporting apparent violators to the FSA headquarters in Washington D.C.

Violations include failure to file on time, to keep past filings up to date, or submission of a report misleading or false information, or failure to submit a report within 30 days from receiving an FSA letter identifying required disclosure.

HOW DO AFIDA PENALTIES WORK?

Congress charged the FSA administrator with assessing penalties for failure to meet the filing deadline or for submitting false or incorrect information. The

FSA administrator may fine a foreign person up to 25 percent of the value of the foreign person's interest in such land, or 1/10th of one percent for each week a report is late, but also subject to the 25 percent cap.

Congress provided four factors that may subject the fine to one or more downward adjustments:

- (1) Time the violation existed;
- (2) Method of discovering the violation;
- (3) Extenuating circumstances; and
- (4) Nature of the information misstated or not reported.

In our experience, the first three factors can result in a substantial reduction in the penalty and the fourth can benefit careful and accurate report preparation. Under certain circumstances, a strong self-report coupled with good follow through with FSA staff can bring the fine below the point where contesting it would cost more in money and time that could have been spent more effectively on executing the business plan.

DO STATES REGULATE FOREIGN AGRICULTURAL LAND USE?

Yes, most states in the Midwest—but not all—have “mini-AFIDA” statutes or other restrictions on foreign ownership of agriculture land. Several prohibit corporations from holding farm land (e.g., Nebraska), others require disclosure via their own state forms (e.g., Iowa), and some will accept copies of the federal Form 153 AFIDA reports (e.g., Illinois). These laws' purposes include protecting family farms and restricting foreign ownership of agricultural land. Most predate adoption of the limited liability company (“LLC”) in the mid-1990s and modern wind or solar development, and thus have no express exemption in the way mineral exploration, for example, does in some states. One common exemption to the corporate ban permits holding agricultural land to the extent it is “necessary” to engage in non-agricultural business purposes.

Case law examining this exemption, as well as bans on foreign ownership, has been favorable to renewable energy projects (e.g., Oklahoma). Navigating these state bans, exemptions, and disclosure requirements requires a consolidated approach, particularly when a developer plans to use FSA-filed 153 reports to meet a state requirement.

CONCLUSION

Given the potential penalties and complexities attendant to renewable energy development, retaining counsel that is not only familiar with the substance of the law, but also how the FSA administers foreign ownership reporting is important. For large operations, we cannot stress enough the importance of adding compliance staff who know what information compliance with AFIDA, and state equivalents, requires.