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## Freedom of Information Act Is No Guarantee for Data Access

Savvy energy developers are accustomed to analyzing land use constraints. Until recently, the constraints posed by land enrolled in federal farmland programs could be assessed by obtaining enrollment data from the Farm Service Agency (FSA). Changes in the law have restricted direct access to these data, however. Even Freedom of Information Act (FOIA) requests, which have been a secondary tactic for data acquisition, may now be ineffective. Although the data are not inaccessible, the process of acquiring them has become more cumbersome.

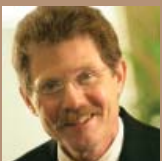
There is a menagerie of farmland programs that affect energy development in different ways. Enrollment in the Conservation Reserve Program (CRP) or the Farm Loan Program, for example, may trigger environmental review under the National Environmental Policy Act, as profiled in the November 2008 TOPICS. Other programs include the Farmland Protection Program, Farm and Ranch Land Protection Program, Prime and Unique Farmlands, and Wetland Reserve Program.



Data on farmland program participation have often been obtained in geospatial format for constraint analyses using Geographic Information Systems (GIS). An energy developer's ability to obtain data from the FSA has frequently been a "hit or miss" proposition, depending on the sophistication and regulatory bent of individual FSA offices. Citing privacy concerns, some FSA offices have denied requests for farmland program enrollment data, even after FOIA was invoked. Similarly, the FSA considers wetland mapping to be privileged information and also routinely declines these data requests.

The 2008 Farm Bill made restrictions on data release consistent across FSA offices by precluding disclosure of information concerning agricultural operations, farming or conservation practices, and the land itself, including geospatial data. The Bill provided an exception for disclosure of information altered to protect individual identity. In January 2009, however, a test of this "exception" was carried out unsuccessfully. After the local FSA office denied an initial data request by a wind energy developer, the developer made a formal FOIA request. The FOIA request was denied and then appealed by the developer, on the basis that a GIS file showing the outer limits of CRP lands (with no parcel boundaries or other identifying information) is covered by the exception. The appeal was denied.

Energy developers can work around the new rules by obtaining landowner consent to release the data. The FSA has a consent form for this purpose. This is the most direct approach in determining whether land within a project footprint is enrolled in a farmland program or affected by wetland mapping. Developers should also consider addressing consent issues in option and lease agreements, using language that prevents disclosure of the information beyond the project team.



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