

# Mitigation of Farmland Loss

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*American Farmland Trust*

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## Executive Summary

American Farmland Trust (AFT) conducted research to provide the Natural Resources Conservation Service (NRCS) with information about programs that practice mitigation of farmland loss across the country. This report contains a brief summary and evaluation of the Farmland Protection Policy Act (FPPA) and case studies that describe the approaches and results of mitigation efforts in some state and local programs.

Beginning with a short list of programs that were known to practice mitigation, AFT researchers reviewed existing file documents and searched for information in the Farmland Information Center (FIC) library. Additional state programs that had executive orders related to agricultural preservation, and agricultural preservation districts (or security areas) were also identified to determine if mitigation was required. Calls were made to the identified programs and to AFT regional offices to obtain up-to-date information, documents and specific examples where mitigation was practiced.

While the practice of mitigating farmland loss is not widely used, we found that it can be valuable as a tool for protecting specific farmland properties and as a source of funds for local or state farmland protection programs. A few states, such as Vermont and Massachusetts, have used mitigation very successfully. In California, the review process for development under the California Environmental Quality Act (CEQA) has the potential for increased use of mitigation. In other states, legislative authority is in place for mitigation through the use of executive orders and farmland preservation acts, but the practice of mitigation is very limited. A few county and local programs have successfully established mitigation efforts, while other local programs have only recently been established and are too new to have produced any results.

Programs that obtain full mitigation for the loss of farmland appear to be successful under certain conditions. Where a farmland protection program is in place, staff know the value of local conservation easements and can identify parcels of farmland with equal resource value for mitigation. State and local staff with a history of farmland protection have worked to convince other state agencies of the need to require mitigation and to build on earlier efforts, improving the process of mitigation. There also must be a strong public perception that farmland is a valuable and diminishing land use. In small states like Vermont and Massachusetts, or in Washington's rapidly growing King County, farmland loss has bolstered public and government support for mitigation. Where existing Federal and state environmental review processes (CEQA, the National Environmental Policy Act, Massachusetts Environmental Policy Act and Vermont's Act 250) have been used, they appear to provide greater opportunities for mitigation. Finally, when a climate of political support by state executive and legislative branches exists, as demonstrated by executive orders and other farmland protection regulations, mitigation efforts are more successful.

## **Overview**

The purpose of this paper is to provide the Natural Resources Conservation Service (NRCS) with information about programs that mitigate farmland loss across the country. The report includes case studies that describe the approaches and results of mitigation efforts in some state and local programs. The report also contains a brief summary of the Farmland Protection Policy Act (FPPA).

Beginning with a short list of programs that were known to practice mitigation, American Farmland Trust researchers reviewed existing file documents and searched for information in the Farmland Information Center library. Additional state programs that had executive orders related to agricultural preservation, and agricultural preservation districts (or security areas) were also identified to determine if mitigation was required. Calls were then made to the identified programs and to AFT regional offices to obtain up-to-date information, documents and specific examples where mitigation was practiced.

While the practice of mitigating farmland loss is not widely used, we found that it can be valuable as a tool for protecting specific farmland properties and as a source of funds for local or state farmland preservation programs. A few states, such as Vermont and Massachusetts, have used mitigation very successfully. In California, the review process for development under the California Environmental Quality Act (CEQA) has the potential for increased use of mitigation. In some other states (Illinois and Pennsylvania) legislative authority is in place for mitigation through the use of Executive Orders and Farmland Preservation Acts, but the practice of mitigation is very limited. A few county and local programs have successfully established mitigation efforts, while other local programs have only recently been established and are too new to have produced any results.

## **Mitigation of Farmland Loss**

### ***Introduction***

The National Environmental Policy Act (NEPA) defines mitigation as:

- (a) avoiding the impact altogether by not taking a certain action or parts of an action;
- (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- (c) rectifying the impact by repairing, rehabilitating or restoring the impacted environment;
- (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- (e) compensating for the impact by replacing or providing substitute resources or environments.

Mitigation practices are commonly used to protect and restore wetlands. The Army Corps of Engineers, for example, uses the concept of mitigation and “no net loss” routinely for the protection of wetlands. Under some state and local programs, mitigation also is used in farmland protection. The FPPA seeks to minimize impacts to prime farmland from federally funded projects but in practice does not achieve the full range of mitigation.

## ***Farmland Protection Policy Act***

### **Functions and Purposes**

Congress enacted the FPPA as a subtitle of the 1981 Farm Bill. The purpose of the law is to “...minimize the extent to which Federal programs contribute to the unnecessary conversion of farmland to nonagricultural uses...” (P.L. 97-98, Sec. 1539-1549; 7 U.S.C. 4201, et seq.). The FPPA also stipulates that federal programs be compatible with state, local and private efforts to protect farmland. For the purposes of the law, federal programs include construction projects—such as highways, airports, dams and federal buildings—sponsored or financed in whole or part by the federal government, and the management of federal lands. The U.S. Department of Agriculture’s (USDA) NRCS is charged with oversight of the FPPA.

The FPPA does not cover private construction subject to federal permitting and licensing, projects planned and completed without any assistance from a federal agency, federal projects related to national defense during a national emergency and projects proposed on land already committed to urban development. Furthermore, the law cannot be used as the basis of legal actions by state or local governments or private individuals. State governors, however, were given legal standing in 1994 to challenge federal programs that do not comply with the FPPA.

The FPPA created a public education role for the USDA. The NRCS is encouraged to provide technical assistance to state and local governments and nonprofit organizations in the development of programs and policies to protect farmland. The law directed the Secretary of Agriculture to “...designate one or more farmland information centers to serve as central depositories and distribution points for information on farmland issues, policies, programs, technical principles and innovative actions or proposals by local and state governments.” American Farmland Trust’s Farmland Information Center was created under this provision.

### **Implementation**

The FPPA requires federal agencies to examine the impact of their programs before they approve any activity that would convert farmland. To rate the relative impact of projects on sites subject to the FPPA, federal agencies or agencies that use federal funds fill out a Farmland Conversion Impact Rating Form (form AD-1006).

The rating form is based on a Land Evaluation and Site Assessment (LESA) system. LESA measures the quality of farmland through a numerical system having two components. The Land Evaluation element rates soil quality. The Site Assessment component measures other factors that affect the farm’s viability, including but not limited to proximity to water and sewer lines and the size of the parcel. In general, the higher the LESA score, the more appropriate the site is for protection.

Under FPPA, federal agencies sponsoring a project subject to the law complete a site assessment. NRCS provides technical assistance for the land evaluation component. Sites receiving a combined score of less than 160, out of a total possible score of 260, do not require further evaluation. Alternatives should be proposed for sites with a combined score greater than 160

points. On the basis of this analysis, a federal agency may deny assistance to private parties and state and local governments undertaking projects that would convert farmland.

In addition to project evaluation, the FPPA directs each federal government agency to review its rules and procedures, with assistance from the USDA, to determine whether any policies prevent the agency from complying with the law. Agencies must develop proposals to bring their programs into compliance. Each federal agency must submit an annual report to the NRCS describing steps taken to comply with the law.

## **Case Studies**

AFT has identified and researched several programs that practice mitigation of farmland. A few examples of specific projects where mitigation has been used successfully, or at least been attempted, are also included. The following case studies of federal, state and local farmland mitigation efforts illustrate mitigation practices around the country. The case studies are organized into two groups: 1) programs directly focused on farmland preservation and 2) programs in which mitigation of farmland loss is a component of a larger environmental review process.

The first group, where farmland preservation is the direct focus, includes:

- Davis, California
- Illinois
- King County, Washington
- Massachusetts

The second group of case studies in which mitigation is a component of a larger environmental review process includes:

- Vermont's Act 250
- The California Environmental Quality Act (CEQA)
- The Transportation Equity Act for the 21<sup>st</sup> Century (TEA -21)

## **CASE STUDY – DAVIS, CALIFORNIA**

### **LEGAL AUTHORITY**

In 1995, the City of Davis, California, located in Yolo County and bordered by Solano County, established an agricultural land mitigation requirement through an article amendment to its “Right to Farm and Farmland Preservation” ordinance. Adopting a “no net loss of farmland” approach, the Davis ordinance requires developers to permanently protect one acre of farmland for every acre of agricultural land they convert to other uses. The purpose of the article is to implement the agricultural land conservation policies contained in the Davis general plan with a program designed to permanently protect agricultural land within the Davis planning area for agricultural uses. The article was found necessary for the following reasons:

- Yolo and Solano county farmland is of exceptional productive quality.
- Loss of agricultural land is consistently a significant impact under the California Environmental Quality Act in development projects.
- Davis is surrounded by farmland.
- The Yolo and Solano county general plans clearly include policies to preserve farmland.
- The continuation of agricultural operations preserves the landscape and environmental resources.
- Loss of farmland to development is irreparable and agriculture is an important component of the city’s economy.
- Losing agricultural land will have a cumulatively negative impact on the economy of the city and the counties of Yolo and Solano.
- Some urban uses when contiguous to farmland can affect how an agricultural use can be operated, which can lead to the conversion of agricultural land to urban use.

### **PROGRAM PROCEDURES**

Applicants for zoning changes or any other discretionary entitlement that will change the use of agricultural land to any nonagricultural zone or use are required to provide mitigation. The program applies to those land areas of the county and/or city specifically classed and zoned as Agricultural Preserve (A-P), Agricultural Exclusive (A-E) or Agricultural General (A-1) (as those zones are defined in the Yolo County zoning ordinances); and those land areas of the City of Davis specifically classed and zoned Exclusive Agriculture (A-40) (as defined in the Solano County zoning ordinance); and those land areas of the city of Davis specifically classed and zoned as Agricultural (A), Agricultural Planned Development or Urban Reserve where the soil of the land contains 1, 2, 3 or 4 soils, as defined by the NRCS.

The Davis Planning Commission acts as the advisory committee and provides program oversight. The specific duties of the advisory committee are to:

- recommend areas where mitigation zones would be preferred in the Davis planning area,
- promote conservation of agricultural land in Yolo and Solano counties by offering information and assistance to landowners and others,
- recommend tentative approval of mitigation proposals to the City Council,
- certify that the agricultural mitigation land meets the requirements of the program.



The Natural Resources Commission provides monitoring of all lands and easements acquired under the program, as well as the implementation of all management and maintenance plans. An annual report is required on the status of all lands and easements acquired. Finally, all actions of the Planning Commission and the Natural Resources Commission are subject to the approval of the Davis City Council.

### **Mitigation Requirements and Options**

Agricultural mitigation is satisfied under the following conditions:

- Granting a farmland conservation easement for the portion of the land that will no longer be used for agricultural land, including land used for park or recreation purposes, equal to the acreage converted.
- Payment of a fee equal to or greater than the value of a previous farmland conservation transaction in the planning area plus the estimated cost of legal appraisal and other costs, including staff time, to acquire property for agricultural mitigation. The fee must be used for farmland mitigation purposes, with priority given to lands with prime agricultural soils and habitat value.
- Land included with the 100-foot agricultural buffer required by section 30-50 (c) shall not be included for the purposes of determining the amount of land that is required for mitigation.
- Easements may overlap partially or completely with habitat easement areas approved by the State Department of Fish and Game. Up to 20 percent of the farmland conservation easement area may be enhanced for wildlife habitat purposes. The habitat program may require appropriate maintenance, processing or other fees.

### **Eligible Agricultural Land or Farmland:**

The agricultural mitigation land has to be located within the Davis planning area and should:

- be compatible with the Davis general plan;
- include agricultural land similar to the acreage, soil capability and water use sought to be changed to non-agricultural use;
- not be subject to any easements or physical conditions that would legally or practicably preclude modification to a non-agricultural use; and
- be 20 acres or more, although smaller parcels may be considered if the mitigation required is less or when the land is adjacent to larger parcels of protected land.

### **PROGRAM RESULTS**

As of September 2001, 15 agricultural mitigation projects had been approved including four easements covering 275 acres with easement values approximately \$1,200 an acre. Since 1995, \$1.5 million of in-lieu fees were generated. The in-lieu fee option is more popular with developers and staff because of simplicity and the ability to use fees as matching funds for state and Federal farmland protection programs.

## **CASE STUDY – KING COUNTY, WASHINGTON**

### **LEGAL AUTHORITY**

The King County Comprehensive Plan includes a “no net loss” provision regarding its Agricultural Production Districts (APDs). The policies in the comprehensive plan call for King County to:

- protect productive farmland by designation and zoning;
- limit development to uses that are necessary to support commercial agriculture;
- prevent or minimize land use conflicts between farming operations and adjacent land uses;
- allow necessary infrastructure (markets, water, affordable housing, supply stores, technical services, tax incentives) that supports commercial agriculture; and
- encourage farming practices that conserve soils and protect water quality, fisheries and wildlife.

In 1985, King County APDs covering roughly 40,000 acres with large lot zoning of 10 and 35 acres, and specifying agriculture as the preferred use in these areas. The APDs present the least number of land use conflicts for agriculture, contain agricultural support activities and provide the best environment for farming in King County. The five APDs are: Sammamish Valley, Snoqualmie Valley, Lower Green River Valley, Upper Green River Valley and Enumclaw Plateau. Most of the farmlands preserved under King County’s Farmland Protection Program are found in these APDs.

King County’s Farmland Preservation Program, started in 1979 when the voters of King County approved an initiative authorizing the county to preserve rapidly diminishing farmland. During the 1980s, King County acquired the development rights on 12,600 acres of high quality farmland within its boundaries. The county is continuing to purchase development rights on select properties, and there are now approximately 12,800 acres that are permanently protected.

### **PROGRAM PROCEDURES**

APDs are blocks of contiguous farmland where agriculture is supported through the protection of agricultural soils and related support services and activities. Roads and natural features are appropriate boundaries for APDs to reduce the possibility of conflicts with adjacent land uses. All parcels within the boundaries of an APD should be zoned agricultural, either A-10 or A-35. If small parcels in the APD are not zoned for agriculture, permitted nonresidential uses must not conflict with agricultural uses in the APD. Lands can be removed from APDs only when it can be demonstrated that: a) removal of the land will not diminish the productivity of prime agricultural soils or the effectiveness of farming within the local APD boundaries and b) the land is determined to be no longer suitable for agricultural purposes. In addition to meeting these two tests, removal of the land from the APD may only occur if it is “mitigated through the addition of agricultural land abutting the same APD of equal acreage and of equal or greater soils and agriculture value.”

The Farmland Preservation Program is a voluntary program. In selling the development rights to their property, owners allow restrictive covenants to be placed on the property that limit its use and development. The covenants restrict the property to agricultural or open space uses, limit the

number of residences permitted, require that 95 percent of the property be kept open and available for cultivation, require a minimum lot size if the property is subdivided and restrict activities that would impair the agricultural capability of the property. The restrictive covenants are contained in a conveyance instrument called the Deed of and Agreement Relating to Development Rights.

### **Mitigation Requirements and Options**

Conversion of APD land may occur only if mitigated through the addition of agricultural land abutting a King County APD of equal acreage and of equal or greater soils and agricultural value.

### **PROGRAM RESULTS**

The King County Farmland Preservation Program has not requested any mitigation for projects in APDs. They have fine-tuned the APD areas by redrawing the boundaries to match parcel lines and to remove agricultural land that is no longer productive. Several small county highway projects have been reviewed and changed to reduce impacts to farmland. However, the program is currently working on a draft of a farmland mitigation-banking ordinance to be adopted by the county. Highway development projects will purchase easements on properties in APDs to offset projected farmland loss from highway projects planned over the next few years. The ordinance will be completed by the end of 2002 and may be adopted by 2003.

## **CASE STUDY – ILLINOIS**

### **LEGISLATIVE AUTHORITY**

Legislative authority for mitigation of farmland loss resides in two Illinois documents: Act 75, the “Farmland Preservation Act” and Executive Order Number 4, 1980, Preservation of Illinois Farmland. The Farmland Preservation Act created an Inter-Agency Committee on Farmland, consisting of representatives of the Capital Development Board, the Department of Natural Resources, the Department of Commerce and Community Affairs, the Environmental Protection Agency, the Department of Transportation, the Bureau of the Budget, the Illinois Commerce Commission and the Department of Agriculture.

The Inter-Agency Committee prepared policy statements and working agreements for the participating agencies outlining the policy of each agency toward farmland preservation and the administrative process used to implement that policy. The policy statements and working agreements were prepared as rules for the administration of the program. The policy statement included an analysis of the impact of agricultural land conversions attributed to each agency’s programs, regulations, procedures and operations, and detailed measures that can be implemented to mitigate conversions to the maximum extent practicable.

State agency policy statements and working agreements on farmland preservation were to be submitted to the governor and the General Assembly and updated, reviewed and approved every three years by the Department of Agriculture.

### **PROGRAM PROCEDURES**

When any state agency participates in a state-funded capital project that will lead to conversion of farmland to nonagricultural purposes, the agency is required to deliver written notification of the project to the director of the Department of Agriculture. The director determines whether the project is in compliance with the agency’s policy statements and working agreements on farmland preservation and conducts a study of the agricultural impacts if the project is not in compliance. No agency can commit state funds for land acquisition or construction unless it is provided for in an exception contained in that agency’s working agreement or until the study of agricultural impacts has been completed by the Department of Agriculture.

### **SAMPLE PROJECT**

In 1996, the Illinois Department of Agriculture (IDOA) reviewed an agricultural impact analysis prepared by a consulting engineering firm for a highway construction project.<sup>1</sup> The project involved the construction of a new two-lane highway from Illinois Route 29 at Rochester to I-72 southeast of Riverton, a distance of 6.5 miles. Of the 132.9 acres needed to construct the highway, 110.3 acres were comprised of prime soils and 19.4 acres were comprised of important soils.

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<sup>1</sup> Based on a letter from Jim Hartwig of the Illinois Department of Agriculture to Hanson Engineers, 1996.

The Department of Agriculture listed some of the decisions that had already been made to reduce the project's agricultural impacts as follows:

- Of all the build alternatives studied, the one requiring the least amount of prime and important farmland for additional right-of-way was chosen as the county's preferred alternative.
- Design standards that minimize the project's right-of-way needs would be utilized;
- The preferred alternative was designed to follow property lines and existing highway right-of-way wherever possible, avoiding and minimizing the number and acreage of uneconomical remnants and severed parcels.
- The preferred alternative would not result in the creation of any landlocked parcels or permanent adverse travel for nearby farmers.
- No farmsteads would be taken for highway right-of-way purposes.
- All surface and subsurface drainage of adjacent fields would be maintained.
- Utility relocations would occur within the right-of-way acquired for the proposed highway rather than on farmland adjacent to the highway.

In addition, the department requested that the estimated 180,000 cubic yards of fill material to be used in the project not be obtained from borrow sites comprised of prime farmland. It also suggested that when selecting sites for wetland mitigation, the consultants should attempt to avoid prime farmland. Finally, by combining borrow areas, wetland mitigation sites and floodplain compensatory storage, impacts to prime farmland could be reduced.

#### **PROGRAM RESULTS**

Illinois has not used the full range of mitigation practices available for farmland loss. According to the Illinois Department of Agriculture, this is due to the economic value of farmland associated with low commodity prices. Much of the state's farmland preservation efforts were first initiated in the 1980s when the economics of the agricultural industry were relatively better. At the moment, there is little public pressure or incentive to require full mitigation measures due to low commodity prices and the lack of public concern about farmland loss. In areas of the state threatened with rapid growth and shrinking farmland acreage the perception of the value of farmland may be different, and there may be opportunities to require greater mitigation.

## **CASE STUDY – MASSACHUSETTS**

### **LEGAL AUTHORITY**

The Commonwealth of Massachusetts for many years has actively promoted the preservation of agricultural land. Through the state's PACE program, called the agricultural preservation restriction (APR) program, since 1977/78, the Commonwealth has invested significant funds to protect critical farmland to protect the economic vitality of the industry and to preserve open space. In addition, Executive Order 193 (EO 193), issued in 1991, complements the APR program as a protective tool through which state agencies are directed to avoid and mitigate against the conversion of farmland. EO 193 seeks to lessen the extent to which state activities contribute to the conversion of agricultural land. State funds and Federal grants administered by the state cannot be used to encourage the conversion of agricultural land to other uses when feasible alternatives are available. State agencies controlling state-owned land suitable for agricultural are required to coordinate agricultural land management policy with the Executive Office of Environmental Affairs. The Massachusetts Department of Food and Agriculture (DFA) negotiates agreements for mitigation of farmland loss.

The DFA also promotes mitigation through its role as a public agency commenting on projects under the Massachusetts Environmental Policy Act (MEPA). MEPA requires that state agencies study the environmental consequences of their actions, including permitting and financial assistance. It also requires agencies to take all feasible measures to avoid, minimize and mitigate damage to the environment (Section 61 of MEPA statutes). MEPA further requires that state agencies "use all practicable means and measures to minimize damage to the environment" by studying alternatives to the proposed project and developing enforceable mitigation commitments, which will become permit conditions for the project if and when it is permitted. MEPA applies to projects above a certain size that are either proposed by a state agency or are proposed by municipal, nonprofit or private parties and require a permit, financial assistance, or land transfer from state agencies.

MEPA provides the mechanism through which this information is collected and mitigation is executed. The primary vehicle for the process is an Environmental Impact Report (EIR). MEPA empowers the Secretary of Environmental Affairs to oversee the review process. The process is public and encourages comments from the public and from state, regional and local agencies.

Under MEPA, an Environmental Notification Form is required if, among other things, there is:

- direct alteration of 25 or more acres of land, unless the project is consistent with an approved conservation farm plan or forest cutting plan or other similar generally accepted agricultural or forestry practices;
- conversion of land in active agricultural use to nonagricultural use, provided the land includes soils classified as prime, state-important or unique by the USDA, unless the project is accessory to active agricultural use or consists solely of one single family dwelling; and
- release of an interest in land held for conservation, or agricultural or watershed preservation purposes.

## **PROGRAM PROCEDURES**

The DFA seeks mitigation for projects involving state funds that lead to the conversion of agricultural lands, based on its interpretation of EO 193, and has successfully secured funds for this protection. The DFA has assumed jurisdiction over any project involving state funds. It recently expanded its role to include privately funded development that affects agriculture under the MEPA process. The DFA weighs in on agriculture impacts from development during the Environmental Notification Form submission process. The Secretary of Environmental Affairs then makes the decision to include mitigation when issuing a certificate for the project. The DFA also has an interagency agreement with the Massachusetts Housing Finance Agency to review the location of projects prior to financing commitments.

The DFA goal when negotiating with developers is to: 1) avoid loss of farmland through on-site mitigation, 2) obtain a parcel of farmland similar to the land being developed and 3) secure compensation equal to the cost of protecting comparable agricultural land. Cost figures from APR applications serve as a guideline. The DFA also stipulates that topsoil be removed from development sites and made available to local farmers and greenhouses.

### **Mitigation Requirements and Options**

Executive Order 193 was redrafted in 1999 and specific language was incorporated to reflect the DFA's experience with past projects. The new order states that, "compensation for the loss of agricultural land resulting from conversion to non-agricultural uses may be accomplished in one or a combination of the following ways and in the order of preference listed:

1. On-site mitigation—The permanent protection, through the granting of an APR to the Commonwealth, on any contiguous agricultural land of equal or greater size, soil quality and agricultural viability to the land being lost to conversion.
2. Off-site mitigation—The permanent protection, through the granting of an APR to the Commonwealth, on any contiguous agricultural land of equal or greater size, soil quality and agricultural viability to the land being lost to conversion. Where feasible, the permanently protected land shall be located either in the community or within a contiguous city or town.
3. Off-site mitigation—For each acre of agricultural land being converted, a contribution of \$10,000 per acre. This can be paid to the state, to a qualified non-profit farmland preservation program or to a municipal farmland preservation program."

### **Definition of Agriculture**

The Secretary of Environmental Affairs identifies state-owned land suitable for agricultural use according to the following criteria: a) the presence of soil types capable of supporting or contributing to present or potential commercial agriculture, b) current and historic use for agriculture and c) the absence of non-farm development. Agricultural land is defined as land classified prime, unique, or of state and local importance by the NRCS, as well as land characterized by active agricultural use. State-owned land is land under the custody or control of a state agency, and all lands purchased in whole or in part with state funds or federal funds administered by the state.

### **SAMPLE PROJECT**

In 1992, a large box retail store was proposed in Westfield, Massachusetts, on a site adjacent to the Westfield River. The property to be developed had been used for orchards and greenhouses.

The scope of the project triggered the threshold (amount of land, impervious surface, etc) for review under the Massachusetts Environmental Policy Act, thereby requiring the release of an Environmental Notification Form (ENF) by the proponent. MEPA regulations in 1992 did not list the loss of prime farmland as a significant development threshold, but they have recently been amended to include this category. The DFA responded to the ENF expressing its concerns about the loss of valuable farmland.

In a series of meetings, the DFA negotiated with the project proponent to place an agricultural preservation restriction (APR) on 66 acres of the property in exchange for construction of a retail building and parking on approximately 25 acres of farmland. In addition to the APR, the project proponent agreed to place 26 acres under a conservation restriction covering a 100-foot buffer area adjacent to the river. The conservation restriction was gifted to the City of Westfield Conservation Commission to be used for recreational access to the river.

### **PROGRAM RESULTS**

The use of mitigation as a farmland preservation tool in Massachusetts has been an evolutionary process. The development of a clear definition of mitigation options, a written policy, improved working relationship between the DFA and other state agencies under the MEPA process, and improved legal backup, including memorandums of agreement, are some of the steps that have improved the program's effectiveness. The DFA estimates that since 1991 about 2,000 acres have been placed under the state's APR program and \$1.3 million have been contributed to farmland preservation efforts through mitigation, though some payments are still outstanding and waiting for final project agreements.

The DFA also has negotiated for the removal of topsoil from development sites for use by area agricultural operations. Negotiations with developers have been successful in securing funds for APR applications, donated APR easements and land for a community garden. Funds collected during the process are given to qualified farmland preservation organizations. The DFA is currently proposing legislation, which may be incorporated into the FY 2003 budget, to allow the department to hold money in a trust account dedicated to APR purchases.



## **CASE STUDY – PENNSYLVANIA**

### **LEGAL AUTHORITY**

Pennsylvania's Act 43, the Agricultural Area Security Law (P.L. 128, No. 43), provides protection from nuisance ordinances, along with requiring additional levels of review for projects involving condemnation. In addition, the Agricultural Land Condemnation Approval Board (ALCAB) is required to consider the executive order in its review of agricultural lands proposed for condemnation (eminent domain) authorized under Act 43. Act 43 requires ALCAB's approval for the condemnation of agricultural lands for highways and solid and liquid waste disposal facilities.

Pennsylvania also adopted an Agricultural Land Preservation Policy under Executive Order 1997-6, which states, "It shall be the policy of the Commonwealth to protect, through the administration of all agency programs and regulations, the Commonwealth's 'primary agricultural land' from irreversible conversion to uses that result in its loss as an environmental and essential food and fiber resource. State funds and state-administered federal funds shall not be used to encourage the conversion of 'primary agricultural land' to other uses when feasible alternatives are available."

### **PROGRAM PROCEDURES**

Under the executive order, state agencies are required to amend a document entitled "Guidance for Implementation of the Agricultural Land Preservation Policy." The guidance document lists agency actions including land acquisitions, planning, construction, permit review and financial assistance that might directly or indirectly impact primary agricultural lands. State agencies are required to develop agency guidelines and procedures to eliminate or minimize detrimental impacts to primary agricultural farmlands and to describe any statutes or regulations needed to implement the executive order. Agencies included the Governor's Policy and Budget Office and the departments of Agriculture, Community and Economic Development, Conservation and Natural Resources, Corrections, Education, Environmental Protection, General Services, Transportation, and the Pennsylvania Infrastructure Investment Authority.

According to the Bureau of Farmland Preservation, mitigation of farmland is required when land under an agricultural conservation easement is developed under the condemnation process. A full-time staff person is assigned to work with the Pennsylvania Department of Transportation for highway projects that take farmland. By having a representative of the farmland preservation program working directly with the transportation department, planning in the early stages can avoid some of the impacts to prime farmland. The bureau also cited school projects (a number of them in Lancaster County) where local school boards have all but completed land transactions with farm owners and applied to state Department of Education for funding, only to find out that they have to apply to the ALCAB. Other examples of agency projects that may require mitigation include airport expansions, Pennsylvania Turnpike Commission expansion, construction of new sewage treatment plants and loans for projects funded through the Farmers Home Administration.

### **Mitigation Requirements and Options**

Funds collected by the Bureau of Farmland Preservation are put into state or county farmland preservation programs for purchase of easements. Compensation is the cost of reimbursement for the original purchase of the easement. If the easement is fairly old an updated appraisal can be required.

### **Definition of Agricultural Land**

Primary agricultural land protected under the executive order includes land in active agriculture in the previous three years and is ranked in order of priority as farmland:

1. under an agricultural conservation easement;
2. in Agricultural Security Areas;
3. enrolled in Act 319 (Clean and Green) or Act 515, for preferential tax assessments;
4. planned for agricultural use and subject to effective agricultural zoning under a comprehensive plan and zoning ordinance;
5. mapped by the USDA NRCS as Land Capability Classes I, II, III, and IV and Unique Farmland.

## **CASE STUDY – CALIFORNIA ENVIRONMENTAL QUALITY ACT**

### **LEGISLATIVE AUTHORITY**

The California Environmental Quality Act (CEQA) applies to proposed “projects” requiring approval by state and local government agencies. The purpose of this state law is to inform decision-makers and the public of potentially important environmental impacts and to prevent damage to the environment by identifying and avoiding environmental problems. It requires government decision-makers to explain their actions in approving projects with known environmental impacts.

Under CEQA (Public Policy Code Section 21002.1(b)) “each public agency shall mitigate or avoid the significant effects on the environments of projects that it carries out or approves whenever it is feasible to do so.” CEQA adopts the same definition of mitigation that is contained in the federal NEPA regulations so that this term will have identical meanings under projects subject to both acts.

Public agencies in California, including counties, are encouraged to develop and publish thresholds of significance that they then use in the determination of the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect. Thresholds of significance are adopted for general use as part of the lead agency’s environmental review process, supported by substantial evidence and adopted by ordinance, resolution, rule or regulation through a public review process. Counties and cities, through their comprehensive plans, have identified the importance of farmland and have stated goals for farmland preservation. The loss of prime farmland is often stated as a significant impact when development occurs.

### **PROGRAM PROCEDURES**

CEQA requires an environmental review process for projects that require agencies to take a “discretionary” action. A discretionary action requires that a public office or body make a decision to approve or deny a project. An environmental review document ensures that all potential significant impacts have been investigated and considered. The majority of permits processed by a county are non-discretionary and do not require environmental review. For projects that are discretionary in nature and that do require environmental review, a lead agency analyzes the proposed project and determines which of the following documents should be issued: a categorical exemption, a negative declaration or an environmental impact report (EIR).

A categorical exemption states that a discretionary permit project is exempt from environmental review requirement. A negative declaration includes a brief report, or initial study, that states that a discretionary permit will not have any significant environmental impacts. A negative declaration may be issued even when there are minor impacts if it can be shown that these impacts can be reduced or controlled through approval of conditions. An EIR is a detailed analysis of the potential environmental impacts caused by implementation of a project. An EIR is required for any project that may cause a “significant” environmental impact.

CEQA guidelines provide criteria to help agencies determine whether a project may have significant environmental effects. If an initial study shows that the project may have a significant effect, a lead agency is required to take responsibility for preparing the EIR and overseeing the process of public review (Sections 15080 et seq.). The purpose of an EIR is to identify the significant effects on the environment of a project, identify alternatives and indicate ways to mitigate or avoid significant effects.

The first step in preparing an EIR is to inform interested parties about the proposed project and the preparation of the EIR. A Notice of Preparation is mailed to other government agencies, and meetings may be conducted with community agencies and community groups that may have an interest in the project. A draft EIR (DEIR) is prepared and circulated. Availability of the DEIR is published in newspapers, and individual notices are sent to adjacent property owners and other affected persons. A 30-day public review period is provided for the public to make written comments following completion of the draft. Following the review and comment period, a final EIR is prepared that responds to all legitimate issues raised during circulation of the draft.

## **SAMPLE PROJECTS**

### **The South Packwood Project**

The South Packwood Project Specific Plan in Tulare County, California, covered an area south of Packwood Creek in southern Visalia. The first phase of the plan consisted of a regional retail center on a 130-acre undeveloped portion of the plan area consisting of prime agricultural land, with approximately 62 acres under California Land Conservation Act (Williamson Act) contracts. The Williamson Act enables counties and cities to designate agricultural preserves and to offer tax benefits based on a property's agricultural use value, rather than its market value. The proposed development site was within the Visalia Urban Growth Boundary. Visalia is located in Tulare County, which has been identified as the number one agricultural county in the world, with commodity sales in 2001 of \$3.5 billion.

The project was determined to fall under the CEQA process by the lead agency, and a DEIR was produced for public review. The Impacts and Mitigation section of the DEIR stated that the project's consumption of prime farmland represented a significant impact. The DEIR claimed that the project's significant impacts to agricultural resources could only be avoided by denying the project, which would prevent the conversion to urban uses. It further claimed that denying the project would only forestall the inevitable process of urbanization since the site is on the leading edge of the urban growth area and lies within the Urban Growth Boundary of the city of Visalia. Denial of the project was deemed "not feasible mitigation" under CEQA guidelines, making the impacts significant but unavoidable. The authors of the DEIR then reasoned that since the loss could not be mitigated through "avoidance," the goal of mitigation should be to "minimize" the reduction in the inventory of farmland by maintaining the productivity of remaining prime agricultural land for as long as feasible. They then argued that the county comprehensive plan essentially accomplished this mitigation.

The California office of American Farmland Trust (AFT), in responding to the DEIR, listed several mitigation measures capable of substantially reducing the site-specific and cumulative

impacts. AFT stated that, “In concluding that the impacts are significant and unavoidable, the city has not made a good faith effort at full disclosure of available mitigation measures and alternatives” and “Visalia has an obligation to mitigate the loss of prime farmland.” Potential mitigation measures that should be considered in the EIR include:

- Require project proponents to place an agricultural conservation easement, Farmland Security Zone Contract or other form of long-term reservation on farmland of equivalent quality as a condition of project approval;
- Establish policies and procedures for evaluating the impacts of a project on agriculture and applying these policies consistently to minimize the conversion of prime and important farmland;
- Require project proponents to pay a per-acre mitigation fee to be used for the acquisition of agricultural conservation easements or other long-term farmland protection tools on farmland in another location;
- Require project proponents to evaluate mitigation measures and alternatives that would direct growth toward less productive agricultural land and minimize the loss of prime and important farmland.”

The AFT reviewers cited several examples of mitigation efforts in California, including the City of Davis, and a privately held energy company proposing to build power plants in San Joaquin and Kings counties. The California Energy Commission, for example, requires mitigation of farmland at a 1:1 ratio. AFT also offered information about determining easement values in California. In summary, AFT argued that the DEIR did not address mitigation adequately and argued for further analysis in the final report.

The response by the consultants in the final EIR to the city’s “obligation to mitigate agricultural land conversion,” was that the “city has been at the forefront of planning for growth control, with the specific objective of preventing premature conversion of the agricultural land at the urban fringe.” Essentially, they argued that the central element of Visalia’s general plan, concentric urban development boundaries, was phasing in growth as needed and avoiding the premature development of farmland. As for evaluating alternatives that avoid agricultural land conversion, the city stated that alternative sites considered for the retail center were too small.

In further discussions with the Visalia Planning Department, AFT was told that contributions of funds in-lieu of preservation to a farmland protection program only made sense at a regional level. In an earlier version of its general plan, Visalia considered adopting a farmland preservation program that would include the purchase of agricultural conservation easements (PACE) on farmland. This goal was later changed to participation in a regional PACE program, reasoning that this would provide a level playing field for economic development. Since a regional program does not yet exist, it was argued that there was no opportunity to mitigate farmland loss through purchase of conservation easements or by providing payments in lieu.

### **Imperial County**

Several proposed highway projects in Imperial County, California, will result in hundreds of acres of farmland conversion, including the Brawley Bypass, State Route 111 Realignment, and the State Route 7 Expressway Extension projects. These highway projects are within the territory

of the California Transportation Department's (Caltrans) Region 11. Its Division of Environmental Analysis has been focusing on agricultural parcels surrounding the Route 7 project site for possible easement locations since this area is adjacent to a specific plan area and may be subject to future development pressures. It is proposing to acquire or provide funding to acquire "in perpetuity" agricultural conservation easements to meet farmland mitigation objectives

After evaluating the options and the likelihood of success for implementing an effective mitigation plan, Caltrans considered allocating funds for the purpose of contracting with a nonprofit organization to acquire, manage and enforce an agricultural conservation easement for Route 7 mitigation. Future easement projects for the Brawley Bypass or Route 111 projects in Imperial County would be considered for future funding if Caltrans and the Federal Highway Administration (FHWA) management were satisfied with the success and workability of the Route 7 mitigation plan. At the same time, a strategy to preserve farmland in the Imperial Valley will be pursued, and Caltrans will purchase farmland conservation easements from willing landowners in the area.

An objective of the program is to establish conservation easements on viable agricultural parcels at an acreage ratio of 1:1, or equivalent, for the farmland lost. Caltrans or a private nonprofit organization that is contracted to acquire, manage and enforce agricultural conservation easements will determine the specific ratio. The conservation easement(s) will be developed in coordination with the Imperial County and the NRCS. The FHWA has not agreed to this mitigation as being eligible for federal aid funding; however, discussions are ongoing with the state to determine its acceptability. If not eligible for federal-aid funding, the Caltrans still plans on funding the mitigation from other sources.

### **PROGRAM RESULTS**

The CEQA process has great potential to provide mitigation of farmland loss. Local organizations can use this tool to protect farmland during the EIR review process if they are aware of the range of potential mitigation practices. It could be especially effective when mitigation is used in conjunction with established local or regional farmland preservation programs. At the moment, however, lead agencies may be hesitant to require or agree to mitigation and the additional development costs due to the perception that it will place them at a disadvantage when areas compete for economic development.

It is difficult to describe the "results" of a large and complex environmental program like CEQA. Several county general plans and environmental impact reports discuss the importance of farmland; contain recommendations, policies and programs for land preservation and support for the agricultural industry, and even mention mitigation as a tool to be used by the county. But, making the link between these plans and actual mitigation efforts will require additional research.

## **CASE STUDY – VERMONT’S ACT 250**

### **LEGAL AUTHORITY**

Vermont’s Land Use Law, Act 250, requires that certain kinds of development and subdivision plans obtain a land use permit prior to construction. To obtain a permit, developers or landowners apply to a District Environmental Commission that administers the law. The commission bases its review and decision to issue or deny a permit on 10 criteria of Act 250. The primary focus of these criteria is the impact from the proposed development on air and water quality, water supplies, traffic, educational municipal services, and historic and natural resources. Criteria number 9, Conformance with Capability and Development Plan, contains subsections 9(B) and 9(C) Primary and Secondary Agricultural Soils and Forest Soils. The District Commission must find that the proposed project does not significantly reduce the potential of primary and secondary agricultural or forestry soils on the site. The Vermont Department of Agriculture, Food and Markets developed procedural guidelines (January 2002) for off-site mitigation related to Criteria 9(B).

### **PROGRAM PROCEDURES**

The District Commission reviews an application submitted by project proponents under Act 250, then either grants a permit, generally with conditions, or denies it. The commission also can make specific findings of fact and conclusions of law that explain its decision in detail. Under the soil conservation provisions of Act 250, primary agricultural soils are considered for protection during the review of proposed development projects.

Before mitigation of farmland loss is even considered as a condition for issuing a permit, the applicant must overcome several burdens of proof that there are no feasible alternatives to the project impact. These are:

- The applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses that will significantly reduce their agricultural potential.
- There are no nonagricultural or secondary agricultural soils owned or controlled by the applicant that are reasonably suited to the purpose.
- The subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.
- The development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

Only after all of these conditions are met is mitigation of farmland loss considered.

### **Mitigation Requirements and Options**

In response to a recent court ruling (see sample project), the Vermont Department of Agriculture developed formal guidelines for assessing whether a mitigation agreement is appropriate for any specific project and how the funds would be used. The department’s Act 250 Off-Site Mitigation Procedure for Criteria 9(B) contains the following guidelines:

- The sum of money to be paid will be calculated based on the number of acres of primary agricultural soil that will be lost to the development or sub-division multiplied by the cost of purchasing development rights to primary agricultural soils in proximity to the soils to be developed, taking into account in determining that cost comparable sales and any distinctive characteristics based on the location, accessibility, tract size, quality and existing farm infrastructure of the soils to be developed.
- The off-site mitigation agreement shall include provisions for identifying the specific quality characteristics of the primary agricultural soils to be lost by a development so that mitigation funds will be used to protect soils that contain at least the same or better soil characteristics.
- Agreements will also include provisions that the total of the mitigation payment will be multiplied by a factor of 2, except that: agricultural soils with an agricultural value group rating of 1 will be multiplied by a factor of 3; agricultural soils with a group rating of 2 will be multiplied by a factor of 2.75; agricultural soils with a group rating of 3 will be multiplied by a factor of 2.5, and those with a group rating of 4 by a factor of 2.25 (USDA Agricultural Value Groups for VT Soils).

The Vermont Housing and Conservation Board (VHCB) and the Vermont Department of Agriculture, Food and Markets (DAFM) agreed to the following:

- The DAFM, when requested by a commission, will propose the payment amount based on actual sales of development rights, market analysis and the Department Act 250 Off-Site Mitigation Procedures. It may also provide the current cost of purchasing development rights on farms in, or in close proximity to, the geographic area of that commission.
- The DAFM will recommend that any mitigation amount approved by a commission be calculated by multiplying the number of acres of primary agricultural soils lost to the proposed development times the cost of purchasing development rights on farmland and then **doubled**.
- VHCB will use payments to purchase development rights or other legal interests in: a) eligible agricultural land in the geographic area covered by the District Environmental Commission or within the “same agricultural use area” or b) eligible agricultural land in any adjacent Environment of District or County. Payments can also be used to supplement public funds awarded by VHCB for a particular farm project, to meet the match requirement for funding local conservation projects and to provide funds to an eligible entity.

### **Definition of Agricultural Soils**

Act 250 defines both primary and secondary agricultural soils. “Primary agricultural soils” means soils that have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations that may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils. (10 V.S.A. 6001(15))

“Forest and secondary agricultural soils” means soils that are not primary agricultural soils but have reasonable potential for commercial forestry or commercial agriculture, and that have not



yet been developed. In order to qualify as forest or secondary agricultural soils the land containing such soils shall be characterized by location, natural conditions and ownership patterns capable of supporting or contributing to present or potential commercial forestry or commercial agriculture. If a tract of land includes other than forest or secondary agricultural soils only the forest or secondary agricultural soils shall be affected by criteria relating specifically to such soils. (10 V.S.A. 6001(8))

### **SAMPLE PROJECT**

A local hospital proposed to build a 92-unit retirement complex on 52 acres of high-quality farmland in Bennington, Vermont. The developer agreed to offset the loss of 42 acres of prime agricultural soils by paying \$112,700 for an off-site mitigation agreement with the state Department of Agriculture (DAG). The Conservation Law Foundation (CLF), representing the Bennington County Conservation District, sought to block the project and the future use of mitigation agreements. The CLF argued that the specific agreement was inappropriate because of the high quality of the soils the project would destroy and that off-site mitigation essentially allowed developers to “buy a permit and then destroy agricultural land.” CLF claimed that mitigation was being used excessively and without adequate assurances that the soils ultimately protected were equivalent in quality and in the same part of the state as those lost to development.

The Vermont Environmental Board denied the permit. In its decision, the board said off-site mitigation should be used “only as a last resort” after developers have exhausted other options to avoid building on high-quality soils. “If efforts to reduce the impacts of a project are not even attempted,” the board wrote, “mitigation agreements will be seen as no more than a cost of doing business.” Furthermore, the board said it would closely evaluate future mitigation proposals. When acceptable, the board will require advance assurances that the funding amount paid by the developer is sufficient to ensure that at least two acres of farmland are purchased for every acre lost to development. “The decision reaffirms mitigation agreements, but what we tried to do is be more specific about when such agreements are acceptable and when they may not be,” said Marcy Harding, chair of the Environmental Board. The ruling effectively killed the project. Within days, the hospital announced it would abandon the development.

In a recent summary of its decision, the Vermont Environmental Board stated that Act 250’s soils criteria reflect the legislature’s belief that “...the agricultural productivity of the land and the economic viability of agricultural units are [a] matter of public good.” Thus, the use of off-site mitigation to protect targeted agricultural land can sometimes be “equally consistent with the legislative intent to protect economically viable agricultural units.” This interpretation may help reconcile the soil conservation provisions of Act 250 and the state’s current farmland protection strategy.

### **PROGRAM RESULTS**

A CLF spokesman predicted that the decision would influence other developers, as well, by sending “a clear signal to the development community that farmland protection is a factor to pay more attention to.” In response to the ruling, state agriculture officials developed formal guidelines for assessing whether a mitigation agreement is appropriate for any specific project and how the funds would be used. Farmland protection officials also developed an approach to

ensuring a correlation, in terms of soil quality, between the land that is lost to development and the land that is conserved.

The VHCB has signed over 40 agreements and used \$365,134 in mitigation funds (matched with VHCB funds) to purchase development rights on 14 farms containing 3,074 acres (MOU, Act 250 Off-Site Farmland Mitigation).

## CASE STUDY – TEA-21

The Transportation Equity Act of the 21<sup>st</sup> Century (TEA-21) provides guidance for the functions and funding of the National Transportation System. TEA-21 awards money for Transportation Enhancements (TE) and requires that 10 percent of Surface Transportation Program funds allocated to states be set aside and made available exclusively for enhancement activities. These enhancements, in many ways, function as mitigation of the impacts of the federal highway system.

Section 1201 of TEA-21 further defines TE activities and specifies that these activities must be considered for programming as part of the development of metropolitan transportation plans and programs. In addition, 23 U.S.C. 135(f) specifies that “the statewide transportation improvement program shall reflect the priorities for programming and expenditure of funds, including transportation enhancements.” The list of qualifying TE activities provided (23 U.S.C. 101(a)(35) of TEA-21) is exclusive, not illustrative. That is, only the activities listed are eligible as TE activities. Two of the 12 eligible TE activities are relevant to farmland preservation: acquisition of scenic easements and scenic or historic sites, and scenic or historic highway programs, including the provision of tourist and welcome center facilities.

Activities that are not explicitly on the list may qualify if they are an integral part of a larger qualifying activity. For example, if the rehabilitation of a historic railroad station required the construction of new drainage facilities, the entire project could be considered for TE funding. Similarly, environmental analysis, project planning, design, land acquisition and construction enhancement activities are eligible for funding. The funded activities must be accessible to the general public or targeted to a broad segment of the general public.

TE projects are required to have a relationship to surface transportation. For example, an enhancement might involve the acquisition of a scenic easement. The acquisition would be in connection with the preservation of a scenic vista related to travel along a specific route. An acquisition for scenic preservation purposes that contributes to the visual experience of the traveler can even be a substantial distance away from a highway or transportation project, if it makes a substantial contribution to the scenic viewshed. It is not necessary that an activity be associated with a specific surface transportation project to be eligible for funding. For example, the rehabilitation of a historic train structure, the provision of a bike or pedestrian path, or the establishment of a transportation museum are TE projects that can be funded apart from a surface transportation project.

Proximity to a highway or transportation facility alone is not sufficient to establish a relationship to surface transportation. Additional discussion, beyond proximity, is needed in the TE project proposal to establish the relationship to transportation. For example, a historic barn that happened to be adjacent to a particular highway facility would not automatically be considered eligible for TE funds simply because of its location. Visibility to the traveler in a way that substantially enhances the traveling experience could qualify. Specific documentation of the enhanced experience is required. A historic structure, such as the barn in the above example, could not be disqualified from consideration because it was not adjacent to a particular federal-aid facility, as long as some other relationship to surface transportation could be established.

## Conclusion

The practice of mitigating farmland loss has evolved since its conception to become a specific tool for farmland preservation. Though its use is not widespread, the number of acres preserved and the funding obtained by the few successful programs identified is impressive. The city of Davis, California has adopted a “no net loss of farmland” approach and built this policy into local ordinances. The Massachusetts Department of Food and Agriculture successfully mitigated the effects of state and Federally funded projects and even some private development. Massachusetts and Vermont have both developed Memorandums of Agreement that clearly spell out the process of mitigation between state agencies. King County, Washington, is considering “mitigation banking” that can be used by agencies such as the Washington Department of Transportation. The choice of mitigation through placing a conservation easement on farmland of equal resource value or requiring payment in lieu will continue to be a strongly debated question. Most programs seemed to like the greater simplicity and flexibility of payments that could be used for other projects.

While the practice of mitigating farmland loss is not widely used, we found that it can be valuable as a tool for protecting specific farmland properties and as a source of funds for local or state farmland preservation programs. A few states, such as Vermont and Massachusetts, have used mitigation very successfully. In California, the review process for development under the California Environmental Quality Act (CEQA) has the potential for increased use of mitigation as evidenced by the cooperation between Imperial County and the California Department of Transportation. In other states, such as Illinois, legislative authority is in place for mitigation through the use of executive orders and farmland preservation acts, but the practice of mitigation is limited to reviewing projects and suggesting strategies to diminish project impact. A few county and local programs have successfully established mitigation efforts, while other local programs have only recently been established and are too new to have produced any results.

Programs that obtain full mitigation for the loss of farmland appear to be most successful when certain conditions. These include:

1. A farmland protection program is in place with operators that know the value of local conservation easements and can identify parcels of farmland with equal resource value.
2. State and local staff with a history of farmland preservation have worked to convince other state agencies of the need to require mitigation. They also build on earlier efforts and improve the process of mitigation.
3. There must be a strong public perception that farmland is a valuable and diminishing land use. In small states like Vermont and Massachusetts, or in Washington’s rapidly growing King County, farmland loss has bolstered public and government support for mitigation.
4. Existing federal and state environmental review processes (NEPA, CEQA, MEPA, ACT 250) have been used to provide greater opportunities for mitigation.
5. A climate of political support by state executive and legislative branches as demonstrated by executive orders and other farmland preservation regulations.

Increasing the practice of mitigation at the national level by requiring mitigation when Federally funded projects consume farmland, will be difficult since there are several limitations or impediments to implementation of the current FPPA. The evaluation of a federal program’s impact on farmland relies on site assessments performed by agencies that are not concerned with

farmland protection and may, in fact, have competing interests. Federal agencies are not required to alter projects to avoid or minimize farmland conversion. They have the option of determining whether a site contains farmland and is therefore subject to the FPPA, without input from the NRCS. Most federal agencies are not represented at the local level and therefore cannot develop a meaningful site assessment system for evaluating the impact of a federal program on farmland. Finally, federal agencies generally fail to return completed AD-1006 forms to NRCS field staff for reporting purposes; therefore, the NRCS has no record of agencies' final decisions and cannot measure the effectiveness of the law.

## **Recommendations**

Based on the research in this paper, AFT offers the following recommendations to move the practice of mitigation of farmland loss forward:

1. More research is needed to ascertain whether legislative authority is already available in other Federal regulations, for example the National Environmental Policy Act (NEPA) and the Transportation Equity Act for the 21<sup>st</sup> Century (TEA 21). If so, these regulations could be used to require mitigation when federally funded projects consume agricultural land. A search should be undertaken to identify other Federal agencies that are practicing mitigation under the authority of legislation.
2. Convene an informal meeting to bring together representatives of those federal agencies most likely to be sponsoring projects that may consume farmland, such as Housing and Urban Development and the Federal Highway Administration, to exchange views on opportunities for, and obstacles to, strengthening the FPPA by practicing mitigation.
3. State and local programs could use local LESA systems to mirror federal language as a way to more easily tap into federal monies for mitigation. NEPA, for example, has mitigation language that is mirrored by CEQA, making the review of projects more consistent.
4. Mitigation efforts should not use Farmland Protection Program (FPP) money to fund other agencies' conversion of agricultural land. The funds for those mitigation efforts should come from the agency that is doing the converting, not the FPP.
5. States, counties or local communities that do not currently require mitigation for farmland loss could benefit from the experience and program documents created by successful programs identified in this paper. Since existing purchase of agricultural conservation easement (PACE) programs have the experience and staff to oversee mitigation efforts, they should be considered a high priority for outreach efforts that share information about mitigation. AFT and NRCS should continue to track new approaches to farmland mitigation and find ways to share this information. Two examples are the King County mitigation banking effort and the Massachusetts Department of Food and Agriculture legislation allowing the department to hold funding for future use.

## Attachments

1. Massachusetts Department of Food and Agriculture, Agricultural Land Mitigation Policy.
2. Massachusetts Executive Order 193, Preservation of State Owned Agricultural Land.
3. Vermont Department of Agriculture, Food and Markets Act 250 Off-Site Mitigation Procedure for Criteria 9(B), January 1, 2002.
4. Vermont Housing and Conservation Board and the Vermont Department of Agriculture Memorandum of Understanding – Act 250 Off-Site Farmland Mitigation.
5. Commonwealth of Pennsylvania Governor’s Office, Executive Order, Agricultural Land Preservation Policy, 1997-6.
6. Condemnation of Agricultural Security Area Farmland. *White v. Pennsylvania Department of Transportation (PennDOT)*.
7. Act 75, Illinois Farmland Preservation Act.
8. Illinois Executive Order Number 4 of 1980, Preservation of Illinois Farmland.
9. Illinois Department of Agriculture. November 13, 1996, letter to Hanson Engineers Incorporated.
10. American Farmland Trust. January 3, 2002, letter to City of Visalia Planning Department.
11. City of Davis, California, Ordinance No. 1823, An Ordinance Amending the City of Davis Code to Provide a Right to Farm and Farmland Preservation Requirements.
12. American Farmland Trust. *Connection* Article, July 2001.