



**STATE OF VERMONT**  
OFFICE OF LEGISLATIVE COUNCIL

**MEMORANDUM**

To: House Committee on Agriculture and Forest Products  
From: Aaron Adler, Legislative Counsel  
Hannah Smith, Law Clerk  
Date: March 10, 2014  
Subject: H.448; Primary Agricultural Soils

On Friday, February 28, 2014, the Committee on Agriculture and Forest Products heard testimony on H.448, an act relating to Act 250 and primary agricultural soils. At the Committee's request, an updated working draft of the bill was drafted to reflect language changes proposed during witness testimony.

We have since reorganized and reworded that draft for clarity and had it proofed by Legislative Council Operations staff. The edited draft, 2.1, is attached. Its substantive legal effect is the same as the prior draft. The following changes were made to the draft that the Committee reviewed on February 28:

- On page 6, language is added to subsection (b) to clarify that the Commission must consider all the listed factors in determining suitable mitigation. The prior draft included language to this effect twice. The new draft states the requirement to consider all listed factors once through a new subdivision (1) that provides that the Commission must make findings on all of the listed factors and requirements.
- The term "factors" replaces the word "criteria," because under Act 250 "criteria" is a term of art that refers specifically to the criteria of 10 V.S.A. § 6086(a).
- On page 7, the draft adds subdivision (2) to state once that any mitigation for conversion of primary agricultural soils must comply with 24 V.S.A. § 2791(13)(A) and (E). Prior drafts listed this requirement twice, under the requirements for on-site and off-site mitigation.
- On page 7, subdivision (3) now refers to mitigation that is *entirely* on-site, to distinguish the requirements under subdivision (3) from those listed under subdivision (4), which can apply to on-site mitigation combined with off-site mitigation.
- Beginning on page 7, the factors used to determine whether off-site mitigation is appropriate are re-ordered. This change clarifies that, to give preference to off-site or a combination of off- and on-site mitigation, the Commission must always find that the factors listed under subdivision (A) and (B) apply, and in subdivision (C), the Commission must also find that entirely on-site mitigation is impractical based *either* on

the recommendation of the Secretary of Agriculture, Food and Markets, or based on existing land uses surrounding the project tract.

- On page 11 beginning on line 17, the draft adds the language “relevant to the agricultural potential of the soils.”

The Committee should be aware of several points when considering this draft:

- The current language states that the Commission shall “give preference” to either on- or off-site mitigation. The term “preference” may connote consideration of factors not listed in the statute, and word “require” may be the right word in this situation.
- The draft includes factors that the District Commission may only consider if there is a recommendation from the Secretary of Agriculture, Food and Markets, and there is no duty on the Secretary’s part to make the recommendation. Language could be added to place such a duty on the Secretary.
- Additionally, it is not clear what recourse there is, if any, if a party disagrees with the Secretary’s recommendation on one of these factors or what weight the District Commission would give the recommendation if challenged. Language could be added to require the District Commission to give substantial deference to the Secretary’s recommendation. In this regard, under current law, the District Commissions are to give substantial deference to the technical expertise of the Secretary of Natural Resources.
- As flagged last week in testimony, H.823, as voted out by House Natural Resources and Energy, amends 10 V.S.A. § 823 in a manner that is not compatible with H.448. If both bills were to pass as currently drafted, H.448 would supersede H.823 because H.448 has a later effective date.
- S.220, as voted out last week by Senate Economic Development, also amends 10 V.S.A. § 6093. S.220 is not directly in conflict because it proposes to amend subdivision of the statute that is not addressed by the current draft of H.448. That subdivision concerns the permitting of industrial parks in relation to primary agricultural soils.