



House Committee on Agriculture and Forest Products
H.448 Mitigation of Primary Agricultural Soils [Draft No.1.2]
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The Vermont Planners Association (VPA) would like to register our concerns with Committee regarding the current version of H.448 (No. 1.2) as presented this week. These are informed by our strong support for the continued protection of primary agricultural soils under Act 250 as a critical resource for local food production – with a limited, but well-defined option for off-site mitigation – particularly as this conforms to local and regional plans, and implementing regulations and programs to conserve farmland.

VPA supports limiting the definition of “primary agricultural soils” to NRCS soil classifications as proposed. Soils, as a physical resource, should be defined by their physical properties including, in this context, their physical suitability for agriculture, regardless of other site factors or economic considerations. Other factors should be considered only with regard to mitigation.

VPA also supports the expansion of off-site mitigation, at a ratio of 1:1, within designated downtowns and neighborhood development areas, in addition to designated growth centers, given that municipalities are specifically required to identify and address primary agricultural soils within these areas as part of the designation process.

VPA, however, strongly objects to proposed changes to the current statute under §6093 pertaining to on- and off-site mitigation. Currently, under 10. V.S.A. § 6093, if a project is located outside of a designated growth center mitigation shall be provided on site to preserve primary agricultural soils for present and future agricultural use – through innovative land use design that results in compact development patterns (e.g., clustered development).

“Mitigation flexibility” – including a combination of on- and off-site mitigation – may be allowed if it is deemed consistent with the agricultural elements of local and regional plans and the goals of 24 V.S.A. § 4302 [state planning goals].” While this language references “agricultural elements” that technically are addressed under municipal and regional land use plans (and related resource protection policies) – the intent is clear: plans, and state planning goals relevant and applicable to a particular project are to be used to determine when off-site mitigation, within or outside of designated areas, may be appropriate.

The current language is consistent with long-standing requirements for project conformance with state planning policies, and municipal and regional plans (see attached). Adopted plans, and associated maps that have the purpose of implementing state planning policies should provide the basis and context for making such determinations, especially given that farming in Vermont is changing – to include suburban infill and urban agriculture on smaller parcels, and the farming of previously fallow or abandoned farmland.

Proposed changes under this section:

- **Effectively give on- and off-site mitigation equal weight.** On-site mitigation is no longer clearly preferred outside of designated areas.
- **Remove any consideration of local and regional plans, and relevant state planning goals,** in determining which may be more appropriate – including whether the tract of land is included in an area proposed or zoned for development, or resource protection, conservation and farmland preservation.
- **Substitute “compliance” with more generally stated smart growth principles** under 24 V.S.A. § 2791(13)(A) 12 and (E) for consistency with local and regional plan policies and elements in considering appropriate forms of mitigation:
 - (A) Maintains the historic development pattern of compact village and urban centers separated by rural countryside.
 - (E) Serves to strengthen agricultural and forest industries and minimizes conflicts of development with these industries

These principles are more broadly stated than similar state planning goals under 24 V.S.A. § 4302, especially as implemented through comprehensive plans and regulations (see attached); and, as found outside of the Planning Act, have no particular relevance for local, regional or state agency planning. They are also so generally stated as to be meaningless in a regulatory context.

- Allow the determination of appropriate mitigation to be made by the developer, the District Commission and the Secretary of Agriculture in the absence of any spatial context, other than the existing development pattern in the immediate vicinity of a project. This may not bode well for resource protection in support of urban and infill farming or for other forms of local food production in urbanizing areas – including community and kitchen gardens

NRB staff have suggested that many municipal and regional plans do not adequately protect primary agricultural soils; therefore no plans should be considered in determining whether on- or off-site mitigation is appropriate.

VPA submits that many regional and local plans do specifically – and in this context more comprehensively—address the protection of primary agricultural soils in relation to larger farmland preservation objectives, designated centers (existing and proposed) and planned patterns of growth and development. This is especially true for plans in communities that are experiencing significant development pressure. If a plan isn’t specific enough to apply to a particular development then, under related criteria and case law, applicable bylaws can be considered where relevant or the plan can be ignored. Other considerations as proposed may also be relevant, but should not preempt or replace conformance with an adopted plan.

*Instead of negating the use of plans in this context, and in effect undermining the purpose of the planning process under the Vermont Planning and Development Act, the Agency of Agriculture Food and Markets, and the NRB should instead **work through regional planning commissions,***

with local communities, to provide the necessary guidance called for in statute and to ensure that local and regional plans are relevant and useful in making these determinations.

Attachment: Planning Basis for Resource Protection, Development Regulation

State planning goals, and associated municipal, regional and relevant state agency plans, have and should continue to provide the grounding in public policy for the protection of primary agricultural soils, and the larger context for determining when off-site mitigation may be appropriate.

- **Under Criterion 9 of Act 250 a District Commission is required to find that a subdivision or development “Is in conformance with a duly adopted capability and development plan, and state land use plan when adopted.”** The land capability and development plan developed for this purpose (under 10 V.S.A. § 6402) was intended to “guide and accomplish a coordinated, efficient and economic development of the state,” including the use of the land for urbanization and agriculture, and the conservation and production of the supply of food. In addition, the plan “may accomplish the purposes of **24 V.S.A. § 4302**” – referencing the state planning goals under the Vermont Planning and Development Act. The maps developed in association with the capability plan enacted under this provision, issued in 1974, were never updated and are no longer in use, but did identify and were intended to provide the larger, spatial context for the protection of primary agricultural soils under criterion 9(b).
- **The state land use plan called for under Act 250 was never enacted, and this section of statute was subsequently repealed. In the absence of state plans and maps called for under Act 250, under Criterion 10 the Commission must find that the subdivision or development “Is in conformance with a duly adopted local or regional plan.”** In the event that a plan is ambiguous, the commission can refer to bylaws to the extent that they implement and are consistent with the plan. Under related case law, if a plan goal or policy is not clear in its stated intent and application, it may not apply.
- **Municipal and regional plans are required to include a land use plan, consisting of a map and statement of present and prospective uses, indicating those areas proposed for ...agriculture (using the agricultural land identification process established by the Secretary of Agriculture under 6. V.S.A. §8.** One of the statutory duties of a regional planning commission is to “use a land evaluation and site assessment system” (e.g., an NRCS LESA process that rates and ranks both soil and site considerations) including criteria established by the Secretary of Agriculture to “identify viable agricultural lands.” This includes both a consideration of soil conditions (primary agricultural soils) as well as other site factors, such as parcel size, use and location in relation to other forms of development.
- **Regional plans and regionally-approved municipal plans also must be consistent with state planning goals referenced above, under 24 V.S.A. § 4302.** These include goals to:
 - Plan development so as to maintain the historic pattern of compact village and urban centers separated by rural countryside – to include encouraging intensive residential and economic development within locally designated growth centers;
 - To maintain and improve the quality of air, water, wildlife and land resources – by planning for their use and development **in accordance with Act 250 criteria**; and
 - Encourage and strengthen agricultural and forest industries – to include strategies to protect the long-term viability of agricultural and forest lands in part by maintaining a low overall density of development, to encourage the use of locally growth food, and to plan public investment to minimize development pressure on agricultural and forest land.
- **Municipal regulations and programs for farmland protection– including agricultural zoning, clustering requirements, provisions for the transfer of development rights and the acquisition of**

conservation easements – must conform to the municipal plan and be adopted for the purposes set forth in state planning goals.