

Natural Resources Board

Statement of Procedure: Preservation of Primary Agricultural Soils

Revised and adopted by the Natural Resources Board: March 10, 2020. This Procedure supersedes the last *Statement of Procedure: Preservation of Primary Agricultural Soils*, which was effective on September 11, 2012

Effective, March 10, 2020

(A) Purpose. In accordance with Chapter 25 of Title 3 – Vermont’s Administrative Procedure Act, the Natural Resources Board hereby adopts a procedure to define and implement certain elements of 10 V.S.A. § 6086(a)(9)(B) as amended and 10 V.S.A. § 6093, as amended, relating to the protection of primary agricultural soils.

(B) Definitions.

(1) “Reduction in the potential of the primary agricultural soils” means any loss or impairment of the agricultural potential of the primary agricultural soils (as defined within 10 V.S.A. § 6001(15)) on the project tract.

(2) “Compact development patterns” means the use of innovative land use design specifically intended to minimize or eliminate the fragmentation of primary agricultural soils on a project tract, thus preserving a percentage of the primary agricultural soils on a project tract or tracts, capable of supporting or contributing to an economic or commercial agricultural operation, consistent with the ratio requirements of 10 V.S.A. § 6093.

(C) Primary Agricultural Soils Mitigation Flexibility.

(1) Projects located outside of certain designated areas. In appropriate circumstances, the District Environmental Commission (“Commission”) may, in lieu of the provisions of subdivision (2) of 10 V.S.A. § 6093, require payment of an offsite mitigation fee, or any combination of onsite or offsite mitigation.

(2) “Appropriate circumstances” enabling the exercise of mitigation flexibility.

(a) A determination of “appropriate circumstances,” as used in 10 V.S.A. § 6093(a)(3)(B), may be based on any one of, or a combination of, the findings (1)(A) through (1)(C) below, and a finding of (2) below by a Commission:

(1)(A) The tract of land containing primary agricultural soils is of limited value in terms of contributing to an economic or commercial agricultural operation, and devoting the land to agricultural uses would be impractical based on the size of the tract of land or its location in relationship to other agricultural and nonagricultural uses; or

(1)(B) The project tract is surrounded by or adjacent to other high-density development with supporting infrastructure and, as a result of good land use design, the project will contribute to the existing compact development patterns in the area; or

(1)(C) The area contains a mixture of uses, including commercial and industrial uses, and a significant residential component, supported by municipal infrastructure;

and

(2) The Commission determines that payment of an offsite mitigation fee, or some combination of onsite and offsite mitigation, will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting prime agricultural soils, thus serving to strengthen the long-term economic viability of Vermont's agricultural resources.

(b) Except in the case of an application for a project located in a designated area listed in subdivision 10 V.S.A. § 6093(a)(1), a finding of "appropriate circumstances" shall not relieve an applicant from compliance with 10 V.S.A. § 6086(a)(9)(B)(iii) and 10 V.S.A. § 6093(a)(2)&(3).

(c) An applicant's compliance with 10 V.S.A. § 6086(a)(9)(B)(iii) will inform the Commission as to what primary agricultural soils remain available for on-site mitigation. In some cases, a finding of "appropriate circumstances" may allow for positive findings under § 6086(a)(9)(B)(iii), even when no (or an insufficient number of) acres of primary agricultural soils capable of supporting or contributing to an economic or commercial agricultural operation are preserved on the project tract or tracts.

(D) Criterion 9(B) Review Letter - Agency of Agriculture, Food & Markets. The Agency of Agriculture, Food & Markets ("Agency") is a statutory party under Criterion 9(B) in Act 250 proceedings, and may issue a Review Letter. The applicant may request a Review Letter by submitting a Criterion 9(B) Intake Form and project information, or the Agency may request an Intake Form and project information from the Applicant to facilitate review. When there is potential for impacts under Criterion 9(B), the letter shall contain the following, as applicable: an assessment of whether soils on the project tract meet the definition of primary agricultural soils, the acreage of proposed impact to primary agricultural soils, the acreage of mitigation warranted, the sufficiency of proposed on-site mitigation, the Agency's recommendations, including any recommended land use permit conditions, and justifications for those recommendations; and any other applicable concerns. All mitigation is subject to final approval by the Commission. If the project tract is located outside of certain designated areas described in 10 V.S.A. § 6093(a)(1), establishment of any permit conditions concerning off-site mitigation shall be contingent upon a finding of appropriate circumstances by the Commission. The applicant bears the burden of establishing compliance with Criterion 9(B).

(E) General Requirements: On-site Protection of Primary Agricultural Soils. All primary agricultural soils required for preservation on-site for future agricultural use shall be protected by permit conditions issued by the Commission. Based on the record before it, in situations when an applicant has identified a qualified holder as defined in 10 V.S.A. § 821 who has agreed to accept and perpetually steward a conservation easement over primary agricultural soils on the Project Tract, the Commission may require, through permit condition, the preservation of on-site primary agricultural soils by allowing the Permittee to convey a conservation easement to that qualified holder.