



## Policy Options for Strengthening Farmland Mitigation in Massachusetts and other New England States:

Identifying policy barriers and opportunities around land access and farm transfer



# **Policy Options For Strengthening Farmland Mitigation in Massachusetts and Other New England States**

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***THIS PAPER IS ONE IN A SERIES PRODUCED THROUGH THE  
NEW ENGLAND LAND ACCESS POLICY PROJECT***

A collaboration between American Farmland Trust (AFT), Conservation Law Foundation (CLF) and Land For Good (LFG), the New England Land Access Policy Project facilitated dialogue in each New England state to identify policy barriers and opportunities around land access and farm transfer.

Stakeholders across the board identified farmland mitigation as a tool in reducing farmland conversion and increasing the stock of permanently protected farmland. Stakeholders in Massachusetts felt the time was especially ripe to explore strengthening the Commonwealth's mitigation policy.

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## **INTRODUCTION**

Conversion of farmland to developed uses continues to erode the region's stock of farmland available to established and entering farmers alike.<sup>1</sup> While many factors impact conversion and stemming the loss of farmland requires multiple strategies at multiple levels of government, farmland mitigation is a valuable tool in the state policy toolbox.

American Farmland Trust (AFT) considers a farmland mitigation policy as one that steers siting of public or private development away from productive farmland, and, when development of productive farmland is approved, requires permanent protection of a generally equivalent amount of other farmland. Depending on the policy, that protection can be of other farmland on the development site, in the town or county impacted by the project, or through a financial contribution to a state or local purchase of agricultural conservation easement program.

Of the New England states, Massachusetts and Vermont have the most aggressive farmland mitigation policies. Vermont's policy is rooted in Act 250, its statewide land use law. Massachusetts' authority for farmland mitigation is found in two independent sources—the Massachusetts Environmental Policy Act (MEPA), and an Executive Order signed by Governor Edward King in 1981. Administered by the Massachusetts Department of Agricultural Resources, Executive Order 193 is used with MEPA to mitigate against the alteration of land resources and specifically the conversion of “land in active agricultural use to nonagricultural use, provided the land includes soils classified as prime, state-important or unique.”<sup>2</sup>

In 2015, as part of a statewide food system planning process, a group of agricultural and conservation stakeholders in Massachusetts discussed the need to strengthen the Commonwealth's farmland mitigation policies, in part because of a perceived increase in conversion of farmland for solar development. This paper explores current farmland mitigation policies in Massachusetts and potential means of strengthening them. It also looks briefly at the other New England states and opportunities in each state to advance farmland mitigation policies.

## **CURRENT FARMLAND MITIGATION POLICY IN MASSACHUSETTS**

Farmland mitigation in Massachusetts is authorized through Executive Order 193, elements of which have been partially incorporated into the regulations and administrative procedures of the Massachusetts Environmental Policy Act. In addition, mitigation of greenhouse gas emissions through farmland protection may be achievable under existing policies implementing the Global Warming Solutions Act.

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<sup>1</sup> Data collected at the state level varies by state. The most recent federal data on agricultural land converted to developed uses comes from USDA's 2012 National Resources Inventory (NRI). From 1982-2012, the New England states converted 316,300 acres of agricultural land to development, which represented 10% percent of the region's 1982 agricultural land base. Massachusetts and Rhode Island led the region in development of farmland, at 19% of their 1982 acreage. For more information about the NRI, visit the Farmland Information Center website, at [www.farmlandinfo.org/statistics](http://www.farmlandinfo.org/statistics).

<sup>2</sup> 301 CMR 11.03(1)(b)(4).

### **Executive Order 193**

Executive Order 193 (EO 193) is the original source of authority for the Massachusetts Department of Agricultural Resources (MDAR) to assert farmland mitigation and apply it to review projects under the Massachusetts Environmental Policy Act (MEPA). EO 193 was issued in 1981 by Governor King to protect against the conversion of agricultural land connected to state-owned hospitals. Over time interpretation and application of EO 193 has expanded and farmland mitigation is now part of projects undertaken by other state agencies and private developers.<sup>3</sup>

EO 193 directs “state agencies to mitigate against the conversion of state-owned agricultural land” and sets forth a series of policies intended to prevent against unnecessary conversion of agricultural land. The first relevant mitigation policy mandates that “State funds and federal grants administered by the state shall not be used to encourage the conversion of agricultural land to other uses when feasible alternatives are available.” EO 193 defines “agricultural land” as “land classified Prime, Unique, *or* of State and Local Importance by the USDA Soil Conservation Service, *as well as* land characterized by active agricultural use [emphasis added].”<sup>4</sup> While EO 193 does not define “active agricultural use,” this language is nonetheless significant because it allows MDAR to seek mitigation not only for the conversion of state-owned land, as EO 193 explicitly directs, but also provides authority for mitigating the conversion of private agricultural lands where there is state involvement in the project through permitting or funding.

As an executive order, EO 193 can be repealed at any time by the sitting governor. However, the inclusion of aspects of EO 193 into the MEPA regulations in 1998 partially codified its procedural impact.

### **Massachusetts Environmental Policy Act (MEPA)**

MEPA<sup>5</sup> and its regulations<sup>6</sup> establish procedures to ensure that the environmental impacts from development projects requiring state approvals are identified and addressed. MEPA authorizes the Secretary of the Massachusetts Executive Office of Energy and Environmental affairs (EOEEA) to review the environmental impact of development projects over which it has jurisdiction. The MEPA office within EOEEA carries out this function on behalf of the Secretary of EOEEA.

MEPA’s framework has two purposes:

1. To ensure that state agencies are aware of potential environmental impacts before they take action on projects.
2. To make sure that prior to taking action on projects, state agencies utilize “all feasible means to avoid Damage to the Environment or, to the extent Damage to

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<sup>3</sup> Mass. Exec. Order No. 193 (March 1981).

<sup>4</sup> *Id.*

<sup>5</sup> M.G.L. c. 30 § 61 *et seq.*

<sup>6</sup> 301 CMR 11.00 *et seq.*

the Environment cannot be avoided, to minimize and mitigate Damage to the Environment to the maximum extent practicable.”<sup>7</sup>

MEPA review is triggered by two factors. First, MEPA must have jurisdiction over a project. MEPA has jurisdiction over projects undertaken by state agencies, as well as projects proposed by municipalities or private parties in which a state agency takes action by issuing a permit, providing financial assistance or closing a land transfer.<sup>8</sup> Second, MEPA review is triggered when a project, or an aspect of a project, meets or exceeds applicable “review thresholds” established under MEPA regulations. The review thresholds are used to identify projects “of a nature, size or location that are likely, directly or indirectly, to cause Damage to the Environment,” including conversion of agricultural land to non-agricultural uses.<sup>9</sup>

The MEPA statute requires that projects under MEPA review must include “a finding that all feasible measures have been taken to avoid or minimize said impact.”<sup>10</sup> Massachusetts agencies cannot issue permits, provide funding or otherwise approve projects until they have secured MEPA approval. MEPA requirements are independent of any other review or permitting authority held by other government entities.

If a project is subject to MEPA jurisdiction and triggers review, a project proponent must file an environmental notification form (ENF) with the Secretary of EOEEA (the Secretary). The Secretary then determines whether the project requires a more in-depth environmental impact report (EIR). If an EIR is required, after public notice and a public review period, the Secretary issues a final declaration stating whether the Final EIR (FEIR) complies with MEPA. State agencies generally issue permits for projects following FEIR approval.

For the purposes of agricultural land conversion and mitigation, the relevant review thresholds under the MEPA regulations for filing an ENF are those for “land.”<sup>11</sup> They include:

- Direct alteration of 25 or more acres of land, unless the project is consistent with an approved conservation farm plan or forest cutting or other similar generally accepted agricultural or forestry practices;
- Creation of five or more acres of impervious area;
- Conversion of land held for natural purposes identified in Article 97 of the Amendments to the Constitution of the Commonwealth to any purpose not articulated in Article 97;

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<sup>7</sup> 301 CMR 11.01(1)(a).

<sup>8</sup> 301 CMR 11.01(2)(a). MEPA jurisdiction is “broad” or “full scope” when a project is undertaken directly by an agency or when an agency provides financial assistance. Broad jurisdiction extends to all aspects of a project that are likely to cause damage to the environment. Projects that only involve state permitting or land transfers are subject to limited jurisdiction over those aspects of the project that involve the subject matter of the permit process or the land area to be transferred.

<sup>9</sup> 301 CMR 11.01(2)(b). Agricultural land conversion was added as a trigger for review in the 1998 amendments to the regulations. *See* 301 CMR 11.03(1)(b)(4).

<sup>10</sup> M.G.L. c. 30 § 61.

<sup>11</sup> 301 CMR 11.03(1).

- Conversion of land in active agriculture to nonagricultural use, provided the land includes soils classified as prime, state-important or unique by USDA, unless the project is accessory to active agricultural use or consists solely of one single-family dwelling;
- Release of an interest in land held for conservation, preservation or agricultural or watershed purposes; or
- Approval in accordance with state law of a new urban redevelopment project or a fundamental change in an approved urban redevelopment project, provided that the project consists of 100 or more dwelling units or 50,000 or more square feet of non-residential space.
- Approval in accordance with state law of a new urban renewal plan or a major modification of an existing plan.<sup>12</sup>

Projects that are required to file an ENF may be subject to additional review if required by the Secretary.<sup>13</sup> In addition, projects are subject to a mandatory EIR if they will result in the direct alteration of 50 or more acres or create 10 or more acres of impervious surface area.<sup>14</sup> Finally, there is a provision for “failsafe review” upon the Secretary’s initiative, or upon written petition of one or more state agency or ten or more persons.<sup>15</sup>

Procedurally, the MEPA process regarding conversion of agricultural land is triggered when a project proponent submits an ENF. While the MEPA regulations do not further define “active agricultural use,” the ENF compels project sponsors to declare whether land on the site has “been in active agricultural use in the last five years.”<sup>16</sup> An affirmative response triggers MEPA to seek mitigation recommendations from MDAR.<sup>17</sup>

MDAR’s recommendations to EOEEA are guided by MDAR’s Agricultural Land Mitigation Policy (the Mitigation Policy), developed in 2001, which requires that for every acre of farmland converted, one acre of agricultural land of comparable or greater agricultural viability be permanently protected for future use. This is accomplished, in order of preference, by:

1. The permanent protection of farmland on-site
2. The permanent protection of agricultural land off-site, but where possible in the same community or a contiguous community
3. A financial contribution of \$10,000 per acre to the state farmland protection program, or to “a qualified nonprofit farmland preservation organization or municipal farmland preservation program” as approved by the commissioner.<sup>18</sup>

Recent data on farmland mitigation are not available, but between 1991 and 2002 approximately \$1.3 million in mitigation fees were used to protect about 2,000 acres of

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<sup>12</sup> 301 CMR 11.03(1)(b).

<sup>13</sup> *Id.*

<sup>14</sup> 301 CMR 11.03(1)(a).

<sup>15</sup> 301 CMR 11.04.

<sup>16</sup> The form does not require project proponents to specify whether the land has been in *continuous* agricultural use during the five-year period.

<sup>17</sup> Personal communication with Holly Johnson, MEPA Policy and Program Analyst (April 20, 2016).

<sup>18</sup> “Agricultural Land Mitigation Policy,” Massachusetts Department of Agriculture and Resources (2001).

farmland.<sup>19</sup> There have been very few instances of on or off-site mitigation. EO 193 and MEPA have also been applied to require mitigation for the conversion of prime soils under forested cover.<sup>20</sup>

There are several significant limitations to current farmland mitigation policy in Massachusetts. First, because it is an executive order, EO 193 can be repealed at any time by a sitting governor. While the inclusion of agricultural land conversion in the MEPA regulations provides procedural impediments to eliminating the mitigation policy, there is still no clear statutory requirement mandating mitigation of agricultural land conversion in Massachusetts.

Second, because MEPA establishes jurisdiction by a state agency action, funding or land transfer, applicability of the mitigation policy is sometimes limited in unexpected ways. For example, the conversion of farmland for large-scale photovoltaic arrays has not triggered MEPA in its own right, despite the construction of many such facilities in Massachusetts. In contrast, some solar facilities have triggered MEPA because of impacts to rare and endangered species habitat.<sup>21</sup> The seemingly different application of MEPA is based on jurisdiction, as expressed in an advisory opinion dated August 5, 2009. Because financial assistance provided by state agencies as incentives for solar energy “does not require discretionary approval or evaluation by state agencies prior to disbursement of funds, subjecting projects [that receive incentives] to MEPA review would not advance the underlying purposes of MEPA.”<sup>22</sup> In plain terms, the funding is not discretionary as to project specifics. A similar interpretation applies to the question of permitting:

“A self-certification is generally not considered a Permit under MEPA regulations. Likewise, the MEPA Office has previously ruled that [an agency’s] consent to issuance of building permits ... does not itself constitute a Permit or other Agency Action on a project, as those terms are defined in the regulations.”<sup>23</sup>

By way of contrast, solar projects involving agency management plans for endangered or threatened species habitat have been interpreted to involve the requisite agency discretion to trigger MEPA.<sup>24</sup>

Finally, the entire MEPA process relies on project proponents to self-report agricultural land conversion in their projects when they file an ENF. The process is also predicated upon the presumption that project proponents will properly file the ENF on projects involving conversion of farmland. If no other review thresholds are triggered, the absence of a properly filed ENF for farmland conversion may not be identified by an

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<sup>19</sup> “Mitigation of Farmland Loss,” American Farmland Trust, Sept. 2002, pg 15, [http://www.farmlandinfo.org/sites/default/files/FPPA\\_Mitigation\\_Report\\_1.pdf](http://www.farmlandinfo.org/sites/default/files/FPPA_Mitigation_Report_1.pdf).

<sup>20</sup> EOEEA required mitigation for the conversion of forested prime soils at MDAR’s recommendation during the expansion of a state correctional facility in Shirley, Massachusetts. Personal communication, Barbara Hopson, MDAR Land Use Administrator, (September 3, 2015).

<sup>21</sup> Johnson, *supra* note 14.

<sup>22</sup> Letter from Alicia McDevitt to John W. Wadsworth, “Re: Request for Advisory Opinion, 38-40 Guest Street, Boston, MA” (August 5, 2009)

<sup>23</sup> *Id.*

<sup>24</sup> Johnson, *supra* note 14.

involved state agency in their permitting or funding process without diligent oversight by independent observers. Some state agencies have integrated MEPA review into their own application processes, for example by requiring applicants to affirmatively declare whether or not an ENF is required, in order to prevent errors and oversights.<sup>25</sup> Without such checks it is unlikely that all projects will receive the proper scrutiny.

### **Massachusetts Global Warming Solutions Act**

The Massachusetts Global Warming Solutions Act (GWSA), enacted in 2008, sets ambitious greenhouse gas (GHG) emission reduction goals for Massachusetts. Specifically, the law calls for 10-25 percent reductions of GHG emissions from statewide 1990 GHG emission levels by 2020, and 80 percent reductions by 2050. While the GWSA does not provide for farmland mitigation, there is evidence that reducing farmland conversion and requiring mitigation payments could be effective steps in helping the state achieve its GHG emission goals.<sup>26</sup>

In order to accomplish its objectives, the GWSA:

- Mandates a baseline assessment of GHG emissions in 1990 to measure progress toward fulfilling the objectives of GWSA.<sup>27</sup>
- Requires a plan for achieving the 2020 target emissions standards.
- Calls for interim emissions reduction standards to be set for 2030 and 2040 with accompanying plans for achieving these limits.
- Creates requirements to track and report GHG emission levels.
- Requires climate change impacts to be considered in decisions by state authorities, including permitting and licensing agreements.
- Establishes an advisory committee to analyze strategies and make recommendations for adapting to climate change.
- Requires DEP to promulgate regulations to advance the goals of the GWSA.

On December 29, 2010, EOEEA released the Massachusetts Clean Energy and Climate Plan for 2020. The report established a target 2020 GHG level 25 percent below the 1990 baseline level and a plan to achieve the reduction. Its only references to agriculture focus on the impacts of climate change to the agricultural economy.

While the GWSA calls for far-reaching strategies to reduce GHG emissions, according to the Conservation Law Foundation (CLF) and the Environmental League of Massachusetts<sup>28</sup> the Commonwealth is well behind in achieving its stated benchmarks

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<sup>25</sup> *Id. E.g.*, the Department of Environmental Protection requires MEPA disclosure in its application process for State Revolving Fund water treatment funding, but not all agencies operate similarly.

<sup>26</sup> “A New Comparison of Greenhouse Gas Emissions from California Agricultural and Urban Land Uses,” (Steve Shaffer and Edward Thompson, Jr., American Farmland Trust, 2015).

<sup>27</sup> The Legislature chose 1990 as the baseline for measurements because it is the year used in many climate agreements including the Kyoto Protocol.

<sup>28</sup> The Environmental League of Massachusetts Global Warming Solutions project is an independent effort to evaluate and measure progress under GWSA. Their reporting indicates that Massachusetts is behind and will likely miss the 2020 goal by at least 5 percent without immediate corrective action.

and is unlikely to reach the 2020 GHG reduction goals.<sup>29</sup> A January 2015 report from the Massachusetts Senate Committee on Global Warming and Climate Change notes Massachusetts “is not currently on track to meet its 2020 greenhouse gas emission reduction goal set by the Global Warming Solutions Act” and calls for increased exploration of “lesser discussed areas, specifically agriculture[.]”<sup>30</sup>

GWSA objectives have been integrated into the MEPA process through a Greenhouse Gas Policy (GHG Policy). The GHG Policy establishes guidelines for calculating GHG impacts and evaluating project alternatives, including offsets which could include farmland mitigation.<sup>31</sup>

“MEPA ... recognizes that under certain circumstances, it may not be feasible to implement all of the alternatives described in the EIR. While it is the MEPA Office’s policy to encourage proponents to avoid or minimize GHG emissions on-site, MEPA will also be receptive to proposals to mitigate such emissions through off-site measures[.] ... If offsets are proposed, the proponent should endeavor to select offsets that have local or regional benefits. ... The MEPA Office will seek the assistance of other agencies to determine whether such offsets are real, additional, verifiable, permanent, and enforceable in accordance with state law and Policy.”<sup>32</sup>

The MEPA GHG Policy provides an established avenue by which MDAR’s Mitigation Policy could be used to offset global warming impacts of development anywhere in Massachusetts, but such measures have not been initiated. One possible approach to implementation has been demonstrated in California, where a study by American Farmland Trust found that developed land contributes 58 times more GHG emissions per acre than agricultural land. The study showed that if the rate of farmland conversion in California could be cut in half, 55 million metric tons of GHG emissions could be avoided. This reduction would be the equivalent of taking 2 million cars – or 10% of the automobiles in California – off the road.<sup>33</sup> Informed by this research, in December 2015, the California Strategic Growth Council approved program guidelines and \$40 million in GHG auction proceeds to be used for the permanent protection of farmland in California.<sup>34</sup> Adapting this approach to Massachusetts could help the Commonwealth achieve its GWSA objectives.

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<sup>29</sup> CLF and several co-plaintiffs filed a lawsuit against the Department of Environmental Protection alleging that the agency has failed to promulgate regulations required by section 3(d) of the GWSA to ensure that GHG reduction requirements are met.

<sup>30</sup> “No Time To Waste,” Massachusetts Senate Committee on Global Warming and Climate Change, Feb. 13, 2015, pg. 4, <https://malegislature.gov/Document/Committee/189/Senate/S51/CommitteeAttachment/NO%20TIME%20TO%20WASTE.pdf>.

<sup>31</sup> “Revised MEPA Greenhouse Gas Emissions Policy and Protocol” (2010), <http://www.mass.gov/eea/docs/mepa/ghg-policy-final.pdf>.

<sup>32</sup> *Id.*

<sup>33</sup> “A New Comparison of Greenhouse Gas Emissions from California Agricultural and Urban Land Uses,” (Steve Shaffer and Edward Thompson, Jr., American Farmland Trust, 2015).

<sup>34</sup> See <http://www.conservation.ca.gov/dlrp/SALCP/> for program details.

## **STRENGTHENING FARMLAND MITIGATION IN MASSACHUSETTS**

A number of discrete policy changes could strengthen the Commonwealth's farmland mitigation policies. They include:

- A. *Amend the MEPA Statute to Include Agricultural Land Conversion as "Damage to the Environment."* The MEPA statute contains no language acknowledging agricultural land as a natural resource, the detrimental effects of agricultural land conversion, or the value of farmland mitigation in preventing "damage to the environment."<sup>35</sup> Including agricultural land conversion on this list would put it on par with the other environmental damage under the scope of MEPA.
- B. *Strengthen MEPA Regulations to Clarify Applicability to Conversion of Farmland.* The MEPA regulatory threshold related to conversion of farmland requires both "active agricultural use" and prime or statewide-important farmland soils.<sup>36</sup> This falls short of the broader mandate under EO 193 to mitigate against conversion of farmland soils regardless of current use. In addition, the absence of a regulatory definition of "active agricultural use" leaves open the risk that minor edits to the current ENF format could remove the current 5-year period that is used to identify MEPA applicability.
- C. *Strengthen EO 193 by Reissuing as a New Executive Order Explicitly Authorizing Mitigation of Farmland Conversion Under MEPA.* While the existing EO 193 language explicitly grants MDAR the authority to "mitigate" farmland conversion, MEPA does not identify such an outcome. Because no other similar outcomes are mandated by the MEPA statute or regulations for other types of "damage to the environment," an updated EO may be a more appropriate vehicle to achieve this goal. On the other hand, EO 193 does not explicitly require MDAR to review projects and mitigate farmland conversion on projects that do not involve public land, and an updated EO would present the opportunity to strengthen MDAR's position in the MEPA process, including making its mitigation recommendations binding.<sup>37</sup> However, the political will to use an EO for such technical administrative changes may be limited.
- D. *Strengthen the Agricultural Land Mitigation Policy.* Increasing the amount of compensation required for the loss or conversion of agricultural lands to non-agricultural uses would put more "teeth" into farmland mitigation. Examples include mandating permanent protection of larger parcels (*i.e.*, at a ratio greater than 1:1) for both on- and off-site mitigation and increasing the amount of the financial contribution option from its current rate of \$10,000 per acre to amounts determined by the value of the soils converted or the cost of the mitigation acreage.

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<sup>35</sup> M.G.L. c. 30 § 61.

<sup>36</sup> 301 CMR 11.03(1)(b)(4).

<sup>37</sup> Mass. Exec. Order No. 193 (March 1981).

- E. *Require All State Agencies to Require Applicants to Affirmatively Disclose MEPA Applicability.* This change would help ensure that all agencies are fully compliant with MEPA and would help prevent oversights or omissions by developers from escaping the notice of relevant agencies. This change could be accomplished through regulatory changes or an executive order.
- F. *Clarify Jurisdictional Questions and Assess Impacts of Conversion of Farmland in Large-scale Solar Development and Other Similar Cases.* The determination that an agency activity does not constitute an “Agency Action” or “Financial Assistance” for the purposes of MEPA is a critical jurisdictional issue for farmland mitigation. Clarification and resolution of specific issues involving state agencies can be sought through MEPA’s internal process for failsafe review by the Secretary upon petition by ten or more persons.<sup>38</sup> In the case of large-scale solar development, while approval of incentives for individual projects may not involve specific discretionary action by the state agencies, the policies and regulations developed by agencies play a critical role in shaping the configuration and location of solar projects. Moreover, the permitting process for photovoltaic interconnection may also be amenable to failsafe review under MEPA.

An important first step toward assessing the impact of large-scale solar development on farmland loss would be to convene interested parties or a state task force to review the compatibility of existing programs and policies, as well as photovoltaic design, installation and decommissioning practices for impacts on farmland soils and agricultural production. This would allow informed determinations under MEPA as to whether agency actions are encouraging development resulting in the conversion of agricultural land, and, if so, what steps might be taken to minimize those impacts.

- G. *Collect Data and Build Agency Support for Farmland Mitigation of GHG Emissions.* State agencies are charged with identifying strategies to reduce GHG emissions by the GWSA, so there is an opportunity to explore using farmland protection strategies as a tool in achieving emission targets, particularly through the MEPA process. A full exploration of how farmland protection and agricultural mitigation can support the goals of the GWSA could be a strategy developed in the upcoming 2030 plan based on the research and policy approaches developed in California.

## **FARMLAND MITIGATION IN OTHER NEW ENGLAND STATES**

In Massachusetts, MEPA provides an important statutory framework for the Commonwealth’s farmland mitigation policy. While sixteen states<sup>39</sup>, the District of Columbia and the Commonwealth of Puerto Rico have enacted environmental policy acts (EPAs), only one other state in New England—Connecticut—has a similar statute, and it does not offer a framework for farmland mitigation. Nonetheless, mitigation has been

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<sup>38</sup> 301 CMR 11.04(1).

<sup>39</sup> California, Connecticut, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New York, North Carolina, North Dakota, Virginia, Washington and Wisconsin.

required under Vermont's Act 250 and is authorized in cases of municipal eminent domain in Connecticut. Below is a brief review of applicable policies in each New England state, as well as ways in which farmland protection and land access advocates might engage state policymakers around the issue in the near term.

### Connecticut

Connecticut's Environmental Protection Act (CEPA) defines the environmental resources subject to protection under CEPA, but unlike MEPA, does not include statutory references to agriculture. CEPA lists Connecticut's "natural resources" but does not include agriculture under this term.<sup>40</sup> In 1989, the Supreme Court of Connecticut held that CEPA does not require a developer to consider alternatives to prevent or reduce the destruction of prime agricultural land. In Red Hill Coalition, Inc. v. Town Plan and Zoning Commission of the Town of Glastonbury Et. Al., the Court concluded "that the term 'natural resources' as used in the statute does not include agricultural land." The court maintained that if the legislature wished to include agricultural resources under CEPA, it would have done so expressly, as it had when enacting laws to enable the purchase of agricultural conservation easements and differential property tax assessments for farmland.<sup>41</sup>

While CEPA cannot be used to mitigate against farmland conversion, Connecticut General Statutes Section 22-6 empowers the Commissioner of Agriculture (the Commissioner) to review any proposed capital project receiving state funding that would convert 25 acres or more of prime farmland to nonagricultural use. The Commissioner must report to the state Bond Commission whether the project "promotes agriculture or the goal of agricultural land preservation or if there is no reasonable alternative site for the project."<sup>42</sup> However, the statute does not empower the Commissioner to require mitigation, and in one instance where state funding was used for the development of nearly 100 acres of prime farmland, the project proceeded without mitigation.<sup>43</sup> In that instance, the Department of Agriculture required that the town create a Farmland Preservation Committee to develop a farmland preservation strategy and identify farms for conservation.<sup>44</sup>

In 2004, Connecticut enacted a municipal farmland mitigation policy that requires towns that take agricultural land by eminent domain to mitigate this loss.<sup>45</sup> Local governments may either purchase an agricultural conservation easement on comparable land within its jurisdiction or, if no land is available, pay a mitigation fee to the state's farmland protection program to be used to protect farmland of similar size and quality elsewhere in the state. The state's municipal farmland mitigation policy is limited in scope as it only applies to the taking of farmland by eminent domain. To date, it does not appear that any municipality has been required to take action pursuant to this policy.

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<sup>40</sup> Conn. Gen. Stat. § 22a.

<sup>41</sup> See Conn. Gen. Stat. §§ 22-26aa to 22-26jj; Conn. Gen. Stat. §§ 12-107a to -107f.

<sup>42</sup> Conn. Gen. Stat. § 22-6.

<sup>43</sup> *Id.*

<sup>44</sup> American Farmland Trust, Conservation Law Foundation, Northeast Sustainable Agriculture Working Group, *New England Food Policy: Building a Sustainable Food System*, 2014, pg 11.

<sup>45</sup> Public Act No. 04-222, Conn. Gen. Stat. § 7-131o.

A logical course of action to strengthen the state’s farmland mitigation policy would be to amend Connecticut General Statutes Section 22-6. Such an amendment could empower the Commissioner to not only review any proposed capital project receiving state funding that would convert 25 acres or more of prime farmland to nonagricultural use, but to require mitigation if the Commissioner finds that no feasible project alternative exists. A review of state-funded projects that have converted farmland to developed uses would help to determine whether the 25-acre threshold remains logical. Alternatively, pursuing an Executive Order may be an easier strategy in Connecticut, given the current governor’s strong support for farmland protection.

### Maine

In 2008, the Commission to Study the Future of Farms and Farmland recommended that the state require a review of any state project or state or federally funded project to determine whether it will result in the loss of farmland.<sup>46</sup> The commission envisioned that when an impact on farmland could not reasonably be avoided, mitigation would be required. The Commission discussed adding this project review as a new statutory requirement under either the state Site Location of Development Law or Natural Resources Protection Act.<sup>47</sup> This recommendation provides a good starting point for further discussion.

### New Hampshire

State law requires all state agencies to give due consideration to the state's policy on smart growth when providing advice or expending state or federal funds, for their own use or as pass-through grants, for public works, transportation, or major capital improvement projects, and for the construction, rental, or lease of facilities.<sup>48</sup> The statute explains that “[t]he intent of this action is that new investments and grants for existing sites and buildings in existing community centers will be given preference over investments in outlying areas where that is a practical solution for the use and community in question.”<sup>49</sup> A 2010 Report on Growth Management produced by the state’s Council on Resources and Development details state agency progress toward this requirement and notes that the greatest progress has been through state agency grants and technical assistance programs.<sup>50</sup>

A near-term opportunity to influence New Hampshire’s policy around smart growth and farmland mitigation is through a state commission established through legislation in 2015 and tasked with developing a multi-year statewide Land Conservation Plan.<sup>51</sup> The commission’s charge includes identifying strategies to protect adequate areas of

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<sup>46</sup> State of Maine, 123<sup>rd</sup> Legislature, Second Regular Session, *Final report of the Commission to Study the Protection of Farms and Farmland*, November 2008, pg 11, <https://legislature.maine.gov/legis/opla/farmlandstudyreport.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> N.H. Rev. Stat. Ann. § 9-B:4.

<sup>49</sup> *Id.*

<sup>50</sup> NH Council on Resources and Development, *Report on Growth Management to Governor John Lynch and the New Hampshire General Court*, November 2010. Page 7.

<sup>51</sup> See New Hampshire Senate Bill 38, 2015 Leg. (N.H. 2015), N.H. Rev. Stat. Ann. § 162-C:12.

agricultural soils to support current and future agricultural activities. The commission is required to report its findings and recommendations by September 15, 2016.<sup>52</sup>

### **Rhode Island**

While Rhode Island has no state farmland mitigation policy, it has a “reciprocal” land use planning system whereby local comprehensive plans are reviewed for compatibility with the state “Guide Plan,” and become binding on state agencies once approved.<sup>53</sup> This helps to reduce the likelihood that state-funded projects convert farmland in communities where local farming has been identified as a priority.

### **Vermont**

Vermont’s Act 250 regulates development through a statewide permitting system, and requires mitigation for conversion of farmland under certain circumstances. For new subdivisions or developments involving at least 10 acres or 10 units or more, a project must receive an Act 250 permit. Among other criteria, permits are granted to projects that will not result in reducing the potential of agricultural soils; if this is impossible, permits may require mitigation. Before mitigation of farmland loss is even considered as a condition for issuing a permit, the applicant must demonstrate that there are no feasible alternatives to the project’s impacts. When necessary, a formula is used to determine mitigation steps; this formula varies depending on the location of the project. In some cases developers must pay into the Vermont Housing and Conservation Board trust fund, which administers the state’s farmland preservation program; the price per acre values are determined by the Agency of Agriculture and based on recent values of agricultural conservation easements. In other cases compact development may be required to maintain agricultural land.<sup>54</sup>

As in Massachusetts, the Vermont farmland mitigation policy is incorporated into a broader environmental review process and has been used to limit the impact of new development on farmland and finance the protection of agricultural land when development does occur. As of 2010, the Vermont Housing and Conservation Board had used approximately \$3 million in mitigation funds to protect farmland.<sup>55</sup>

In addition to these existing policies, a legislatively-convened state Solar Siting Task Force released a report in January 2016 with recommendations around solar development. The recommendations include addressing the potential loss of farmland to solar projects by establishing solar siting best practices for use in regional and municipal plans, incentivizing siting of ground-mounted solar projects in preferred locations (away

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<sup>52</sup> *Id.*

<sup>53</sup> The Rhode Island State Guide Plan was established by R.I. Gen. Laws § 42-11-10.

<sup>54</sup> Act 250 (codified at Vt. Stat. Ann. tit. 10, § 151). Mitigation is governed by a “Statement of Procedure: Preservation of Primary Agricultural Soils” adopted by the Vermont Natural Resources Board, <http://www.nrb.state.vt.us/lup/publications/9bprocedure120911.pdf>. A case-study analysis of on-site mitigation in the Burlington area found varied outcomes, partially correlated with parcel size and access considerations:

[http://agriculture.vermont.gov/sites/ag/files/PDF/Act250/OnsiteMitigationReport\\_Final\\_Compressed.pdf](http://agriculture.vermont.gov/sites/ag/files/PDF/Act250/OnsiteMitigationReport_Final_Compressed.pdf).

<sup>55</sup> American Farmland Trust, Conservation Law Foundation, Northeast Sustainable Agriculture Working Group, *New England Food Policy: Building a Sustainable Food System*, 2014.

from open fields in rural areas), and giving the Vermont Agency of Agriculture, Food and Markets party status under the state's energy project approval process under Section 248 of Title 30.<sup>56</sup> This recommendation was included in Senate Bill 230 approved by the Vermont Senate on March 31, 2016, and was under consideration by the Vermont House at the time of the publication of this paper. Farmland protection advocates should remain involved in this process to encourage enactment of these recommendations.

Finally, the Farmland Access and Stewardship Working Group under Vermont's Farm to Plate Initiative has been working with the Agency of Agriculture, Food and Markets to look at ways to encourage more active use of land that has been protected through Act 250's on-site mitigation process. This examination will be instructive to other states considering mitigation policies.

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<sup>56</sup> See Solar Siting Task Force Report To the Vermont House and Senate Committees on Natural Resources and Energy, the House Committee on Commerce and Economic Development, and the Senate Committee on Finance. January 22, 2016.  
[http://solartaskforce.vermont.gov/sites/solarsiting/files/documents/final\\_report/Solar%20Siting%20Task%20Force%20Report\\_Final\\_012216.pdf](http://solartaskforce.vermont.gov/sites/solarsiting/files/documents/final_report/Solar%20Siting%20Task%20Force%20Report_Final_012216.pdf) (accessed March 11, 2016).

This paper is one in a series produced through the **New England Land Access Policy Project**. A collaboration between American Farmland Trust, Conservation Law Foundation, and Land For Good, the **New England Land Access Policy Project** facilitated dialogue in each New England state to identify policy barriers and opportunities around land access and farm transfer.

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