

Natural Resources Board
District Commission Flow Chart
Analysis under Criterion 9(B) – Primary Agricultural Soils

I. Initial Determinations by the Commission

- a. Are there soils on the site which are mapped as primary agricultural soils (PAS) by the Natural Resource Conservation Service (NRCS)? If **NO**, inquiry under 9(B) is complete. If **YES**, proceed to b.
- b. Do the soils meet the definition of primary agricultural soils found at 10 V.S.A. § 6001(15)?
 - i. “Primary agricultural soils” means soil map units with the best combination of physical and chemical characteristics that have a potential for growing food, feed, and forage crops,
 - ii. have sufficient moisture and drainage, plant nutrients or responsiveness to fertilizers,
 - iii. few limitations for cultivation or limitations which may be easily overcome and an average slope that does not exceed 15 percent.
 - iv. Present uses may be cropland, pasture, regenerating forests, forestland, or other agricultural or silvicultural uses.
 - v. However, the soils must be of a size and location, relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation.
 - vi. Unless contradicted by the qualifications stated in this subdivision, primary agricultural soils shall include important farmland soils map units with a rating of prime, statewide, or local importance as defined by the Natural Resources Conservation Service (N.R.C.S.) of the United States Department of Agriculture (U.S.D.A.).
- c. Generally, the soils are presumed to meet the definition of PAS unless the applicant contests the presumption, or unless the Commission determines on its own motion that the soils do not meet the definition. If the applicant contests the presumption, the District Commission must determine whether the soils meet the definition.
 - i. Has Agency of Agriculture provided a soils review letter or other evidence?
 - ii. Has the applicant provided evidence for the Commission to consider?

If the Commission concludes that the soils **do not meet the definition**, inquiry under 9(B) is complete. The Commission must issue a written ruling (Recess Memo, Memorandum of Decision, or Findings of Fact) regarding this

determination. If the Commission determines that the soils **do meet the definition**, proceed to d. (Note: At the request of the applicant, the Commission may issue a written ruling confirming that the soils meet the definition.)

- d. How many acres of PAS will be impacted by project, either directly or indirectly (e.g. through fragmentation)? Do the applicant, Agency of Agriculture, and District Commission agree on this number? If there will be any reduction in the potential of the primary agricultural soils, the subcriteria of 9(B) must be addressed.

II. The Subcriteria of 9(B)

- a. **Subcriterion (i)**: Will the development significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential? If **YES**, the District Commission must deny the project unless this impact can be substantially mitigated or eliminated. If **NO**, proceed to b.
- b. Is the project located in a duly designated growth center? If **NO** proceed to c. If **YES**, proceed to d.
- c. **Project Located on Primary Agricultural Soils Outside Designated Growth Center**; Default mitigation is on-site; ratio is 2:1 – 3:1 depending on quality of soils and other factors specified in §6093(a)(2)(B).
- i. **Subcriterion (ii)**: Are there lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision? If **YES**, the Commission must deny the project. If **NO**, proceed to b.
- ii. **Subcriterion (iii)**: Has the applicant designed the project using “innovative land use design resulting in compact development patterns which will maintain a sufficient acreage of primary agricultural soils on the project tract capable of supporting or contributing to an economic or commercial agricultural operation”? In other words, has the project been designed so that a sufficient acreage of PAS will be maintained on site, using the appropriate mitigation ratio, and these soils are capable of supporting or contributing to an economic or commercial agricultural operation? If YES, the applicant must provide suitable mitigation on-site through protection of the appropriate number of acres of PAS on the project tract pursuant to 10 V.S.A. § 6093, thus satisfying **Subcriterion (iv)**. The Commission will include a permit condition requiring the on-site protection of the required number of acres of PAS. The Agency of

Agriculture may also seek imposition of a “right to farm” condition to avoid future land use conflicts with adjoining property owners. If the answer to subcriterion (iii) above is **NO**, the Commission must either deny the project (or first issue a preliminary decision indicating that it is unable to reach a positive conclusion on this issue) or, in limited circumstances, find that it is appropriate to allow for mitigation flexibility.

- iii. In order to find that **appropriate circumstances** exist, the Commission must find one of the following:
- the tract of land containing primary agricultural soils is of relatively limited value in terms of contributing to an economic or commercial agricultural operation and that devoting the land to agricultural uses is considered to be impractical based on the size of the tract of land, or its location in relationship to other agricultural and nonagricultural uses, or
 - 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
 - the area contains a mixture of uses, including commercial and industrial uses, and a significant residential component, supported by municipal infrastructure.

The Commission must also find that:

- payment of an offsite mitigation fee, or some combination of onsite or 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. The commission must also determine that such action is consistent with the agricultural elements of local and regional plans, as well as the pertaining goals of section 4302 of Title 24.
- iv. If the Commission finds that appropriate circumstances exist to allow for mitigation flexibility, the Commission may approve a combination of on-site and off-site mitigation or may approve off-site mitigation for all of the impacted PAS. Generally, if there is a suitable acreage of PAS on site that the Commission determines capable of supporting or contributing to

an economic or commercial agricultural operation, it may be preferable to protect these soils through on-site mitigation, which will reduce the amount of any required off-site mitigation fee to be paid to VHCB. However, in certain situations, it may be preferable to maximize the development potential of the soils on the project tract and require an off-site mitigation fee for all impacted soils. The Commission should issue a written decision confirming its finding that appropriate circumstances exist. This decision should also request that the Agency of Agriculture, Food, and Markets (AAFM) provide “the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision” and the appropriate mitigation ratio for the soils involved. The Commission must then incorporate this information into a permit condition requiring the applicant to pay a mitigation fee to VHCB. At its discretion, the Commission may also direct the applicant to work with AAFM to develop a mitigation agreement to be executed prior to permit issuance.

v. A sample calculation for combination of on-site and off-site mitigation for projects located outside of designated growth centers:

- Total Number of Acres of PAS = **40**
- Acres of PAS to be Impacted by Development = 15
- 10 Acres of Prime Soils X 2.5 (mitigation ratio) = 25
- 5 Acres of Statewide Soils X 2 (mitigation ratio) = 10
- Mitigation Acreage required **35**
- PAS Available for On-Site Mitigation: 40 - 15 = 25
- PAS to be Mitigated by Off-Site Mitigation Fee = 10
- 10 Acres of PAS X Cost Per Acre of Acquiring Conservation Easements in Area = Off-Site Mitigation Fee

vi. Sample calculation for all off-site mitigation for projects located outside of designated growth centers:

- Total Number of Acres of PAS = **30**

Based on the proposed site plan, the Commission

determines that although only 15 acres of PAS will be directly impacted, the remaining 15 acres will be fragmented, and will no longer be able to contribute to an economic or commercial agricultural operation.

- Acres of PAS to be Directly Impacted = 15
- Acres of PAS to be Indirectly Impacted = 15

- 10 Acres of Prime Soils X 2.5 (mitigation ratio) = 25
- 20 Acres of Statewide Soils X 2 (mitigation ratio) = 40

- Mitigation Acres Required 65

- 65 Acres of PAS X Cost Per Acre of Acquiring Conservation Easements in Area = Off-Site Mitigation Fee

d. **Project Located Within Designated Growth Center;** If the project is located within a designated growth center, the applicant must provide suitable mitigation pursuant to 10 V.S.A. Section 6093, thus satisfying **Subcriterion (iv)**. The default mitigation is off-site; ratio is 1:1; exception for affordable housing as defined in 10 V.S.A. Section 6093(a)(1)(B)(ii) and 27 V.S.A. Section 610.

i. If AAFM has not already done so, it must provide the Commission with “the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision.” The Commission then determines the appropriate mitigation fee and drafts a permit condition requiring the applicant to pay this fee to VHCB. At its discretion, the Commission may instead request that AAFM draft a mitigation agreement; the permit is issued after the mitigation agreement is signed.

ii. Sample Calculation for Off-Site Mitigation:

- Total Number of Acres of PAS = 20

- Acres of PAS to be Directly Impacted = 15
- Acres of PAS to be Indirectly Impacted = 5
- Acres of PAS to be Mitigated = 20

- 20 Acres of PAS X Cost Per Acre of Acquiring Conservation Easements in Area = Off-Site Mitigation Fee
- iii. If the applicant requests that the Commission allow for mitigation flexibility, the Commission must find that the following **appropriate circumstances** exist:
- the proposed mitigation flexibility must be consistent with the agricultural elements of local and regional plans and the goals of 10 V.S.A. § 4302 and
 - the local and regional plans must designate the specific soils within the designated growth center to be preserved on the project site.
- iv. Sample calculation for combination of on-site mitigation within growth center:
- Total Number of Acres of PAS = 20
 - Acres of PAS to be Directly Impacted = 10
 - Acres of PAS to be Indirectly Impacted = 5
 - Acres of PAS to be Mitigated = 15
 - 15 acres of PAS to be protected on-site by permit condition

Last Revised: May 6, 2008