

Tools for Farmland Protection: CEQA and Local Mitigation Ordinances

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What is the Problem?

San Joaquin Valley, the state's leading agricultural region accounts for 55% of the state's total agricultural sales.

61% of all land developed in the San Joaquin Valley between 1990 and 2004 was high quality farmland, the greatest percentage of any region in the state by far.

AFT, Paving Paradise
Report 2007



What is the Problem?

California is the fastest growing state, adding more than 400 thousand new residents per year.

Between 1990 and 2004, over a half million acres of California's farmland were paved over and converted to urban uses.

AFT, Paving Paradise
Report 2007



What is the Problem?

High Quality Farmland as % of all Land Urbanized 1990-2004

Top 10 Counties

Stanislaus* 83%

Kings* 78%

San Joaquin* 76%

Imperial* 74%

Tulare* 71%

Merced* 63%

Fresno* 58%

Sutter 57%

San Benito 50%

Yolo 50%

* Indicates top 10 agricultural producing Counties in California.



Why Protect Agricultural Land?

1. Agricultural lands are an important part of the overall economy;
2. Agricultural lands provide valuable wildlife habitat and corridors;
4. Open space separates communities, improving quality of life; and
5. Agricultural uses are usually a net carbon sink.
(items 2-4 are sometimes called “**ecosystem services**”)



Legal Tools

Local and regional planning documents.

Mitigation programs adopted at local level.

CEQA review of/mitigation for individual projects.

Statewide protection/mitigation requirements.



Local Mitigation Programs

Potential limitations on local mitigation programs:

- 1) California Mitigation Fee Act;
- 2) Constitutional nexus and rough proportionality tests;
- 3) Propositions 13 and 218;
- 4) California Civil Code section 815.3; and
- 5) Equal protection and due process rights under the United States and California Constitutions.



Local and Regional Planning Documents

- General Plans
- Cities and counties have broad police powers with which they can regulate land use, including agricultural uses. (Cal. Const., art. XI, § 7)
- *Building Industry Association of Central California v. County of Stanislaus* (2010) 190 Cal.App.4th 582.
 - County adopted an update to the Ag Element of its General Plan, which included a program called the Farmland Mitigation Program (“FMP”).
 - The purpose of the FMP was to require the permanent protection of farmland through agricultural conservation easements granted in perpetuity over an equivalent area of comparable farmland (1:1 ratio).
 - The court held that the FMP conservation easements in the County’s general plan constituted conservation easements within the meaning of section 815, et seq., even though the FMP guidelines did not specifically refer to section 815.



Local and Regional Planning Documents

- Civ. Code § 815.3, subd. (b), states in pertinent as follows:

“No local governmental entity may condition the issuance of an entitlement for use on the applicant’s granting of the conservation easement pursuant to this chapter.”
- **Key Issue of first impression:** Does Civil Code § 815.3, subdivision (b), prohibit the County from requiring permanent conservation easements as mitigation for the development of farmland in Stanislaus County? The Fifth District Court of Appeal said NO.



Local and Regional Planning Documents

In the *Stanislaus* case, the BIA argued that the FMP was invalid under section 815.3(b) because the County did not have the authority to require *involuntary* agricultural easements. The Appellate Court disagreed, holding that the FMP did not violate the section's prohibition against conditioning the issuance of an entitlement for use on the applicant's granting of a conservation easement because the applicant (or developer) is not *required* to grant the easement. Rather, the FMP allows the applicant to arrange for a third party to voluntarily convey an easement to a land trust or the County.



Local Mitigation Programs

Broad police powers to regulate uses that affect farmland.

Supported by specific statutory mandates:

- Williamson Act (See, e.g. Gov. Code, § 51220.)
- California Environmental Quality Act (See, e.g. Pub. Resources Code, § 21095; CEQA Guidelines, App. G.)
- California Farmland Conservancy Program (See, e.g., Pub. Resources Code, § 10201.)



Local Mitigation Programs

In general, for an exaction to be valid:

- (1) the public agency must have the legal authority to impose the exaction;
- (2) the agency must properly exercise its authority when imposing the exaction;
- (3) a reasonable relationship must exist between the imposed exaction and the public needs created by the development;
- (4) any other statutory restrictions must be met (e.g. Props. 13, 62, 218 and Mitigation Fee Act).

(See 2 Longtin, Longtin's California Land Use (2nd ed. 1987), § 8.04.)



Local Mitigation Programs

Test case: *BIA v. City of Stockton* (Super. Court San Joaquin County, 2007, No. CV032651) regarding Stockton's agricultural in-lieu fee mitigation program. Bases of challenge to fee included :

- (1) excessive and violates the California Mitigation Fee Act;
- (2) constitutes invalid requirement for payment of a fee or dedication of easement prior to the final map under Government Code sections 66007 and 66410 et seq.;
- (3) violates local laws;
- (4) constitutes invalid exaction under constitutional nexus and rough proportionality tests, and due to its failure to comply with CEQA;
- (5) is an authorized special tax in violation of Props. 13 and 218; and
- (6) violates equal protection and due process rights under the United States and California Constitutions.



Local Mitigation Programs

- Trial Court ruling in 2009 upheld Stockton's in-lieu fee program.
- All of BIA's claims rejected.
- Record supported design of in-lieu fee program.
- Case was not appealed.



CEQA Review

But where there is no agricultural mitigation program,

CEQA review of “projects” that would impact agricultural resources may lead to preservation of agricultural lands and/ or reduced impacts on agricultural lands.



CEQA Review

What is CEQA?

- Public agencies should ***investigate*** the environmental consequences of their actions before approving a project.
- Public agencies must ***document*** investigation in an environmental document.
- Public agencies must make certain ***findings*** before adopting a project.
- Also has a substantive mandate:
 - Must strive to substantially reduce or avoid all significant environmental impacts through the adoption of feasible mitigation measures or alternatives.



CEQA Review

What are CEQA's Sources?

- The Statute
 - Cal. Pub. Resources Code, § 21000 et seq.
- State CEQA Guidelines
 - Cal. Code Regs., tit. 14, § 15000 et seq.
- Local CEQA Guidelines
- Case Law

CEQA on the Internet

- www.ceres.ca.gov/ceqa; www.ceqanet.ca.gov



CEQA Review

Agricultural land subdivisions of 4 or fewer parcels are often *mistakenly* considered to be “exempt” from CEQA as a “minor land division” under CEQA Guidelines, § 15315.

This exemption is often inapplicable because only applies to division of 4 or fewer parcels when:

- (1) property is in an urbanized area zoned for residential, commercial or industrial use;
- (2) no variances are required,
- (3) services and access are already available;
- (4) no previous division within 2 years; and
- (5) average slope is less than 20%.



CEQA Review

The categorical exemption from environmental review under the “common sense” exemption under CEQA Guidelines section 15061, subdivision (b)(3) is also usually inapplicable to agricultural land subdivisions.

A project is exempt under this provision “[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” (CEQA Guidelines, § 15061, subd. (b)(3).)

Burden is on agency to show exemption applies and application of the common sense exemption is precluded where “a ‘slight’ showing of a reasonable possibility of a significant environmental impact” is shown. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117.)



CEQA Review

All categorical exemptions are subject to 6 exceptions under CEQA Guidelines, § 15300.2:

- (1) Location is in sensitive environment*
- (2) Significant cumulative impacts*
- (3) Reasonable possibility of a significant effect due to unusual circumstances*
- (4) Damage to scenic resources*
- (5) Located on a hazardous waste site (Cortese List)
- (6) Substantial adverse change in the significance of a historical resource*

* May apply to projects in agricultural areas

Threshold for determining a potentially significant effect is low.
(See *California Farm Bureau Federation v. California Wildlife Conservation* (2006) 143 Cal.App.4th 173 .)

CEQA Review

Once a determination is made that CEQA review must occur, the basic CEQA documents are:

- Initial Study
- Negative Declaration / Mitigated Negative Declaration
- Environmental Impact Report (Supplemental, Subsequent, Program, Master EIRs)

CEQA Review

- See CEQA Guidelines, Appendix G, Agricultural Resources sample questions.
- Note proposed changes to Appendix G pursuant to SB 97 process to add consideration of forestry resources.
- No change to agricultural impact language.



CEQA Review

Negative Declarations/Mitigated Negative Declarations *would only* be appropriate when significant agricultural impacts can be reduced to less than significant levels.

The more conservative approach is to impose mitigation, yet still conclude that the impact is significant and unavoidable.

In such an instance, an EIR would need to be prepared.



CEQA Review

In addition to evaluating the direct and indirect impacts caused by the project, the lead agency must assess whether cumulative effects of the project require an EIR. (Pub. Resources Code, § 21083, subd. (b); CEQA Guidelines, § 15064, subd. (i)(1).)

CEQA requires a mandatory finding of significance for effects that are cumulatively considerable. (Pub. Resources Code, § 21083(b); CEQA Guidelines, § 15065, subd. (c).)



CEQA Review

Cumulative Impacts

- Two-step analysis:
 1. Would the combined effects from the proposed project and other projects be cumulatively significant?
 2. Are the proposed project's incremental effects cumulatively considerable?
- If yes, agency must analyze cumulative impacts.

(Communities for a Better Environment v. California Resources Agency (2000) 103 Cal.App.4th 98, 120.)



CEQA Review

Feasible mitigation measures must be adopted whenever they would substantially lessen the significant effects of the project. (Pub. Resources Code, § 21002.) A lead agency must require feasible mitigation for each significant impact, even if that impact cannot be reduced to less than significant. (See, e.g., *Berkeley Keep Jets Over the Bay Committee*, (2002) 91 Cal.App.4th 1354-1355; CEQA Guidelines, § 15126.4, subd. (a).)



CEQA Review

- What feasible mitigation is available for conversion of agricultural land?
 - Purchase/grant of agricultural conservation easements on other productive farmland;
 - Payment of mitigation fee;
 - Protect part of project site in agriculture;
 - Include adequate buffers on developed property to ensure adjacent agricultural activities are not interfered with; and
 - Record right to farm certificate.



CEQA Review

In *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1269-1270, the Fourth District Court of Appeal considered both offsite and onsite preservation as a means for mitigation for the loss of farmland, and agreed with the defendant that it was not feasible to mitigate the impact of developing agricultural land.

Because agriculture in the area was not feasible in the long-term, and because on-site preservation would reduce development and therefore “impede the City from achieving its General Plan goals and objectives,” the court ruled that the City did not need to require mitigation for the project.

Notably, court did not conclude that, as a matter of law, agricultural easements are never a feasible form of mitigation for the loss of farmland. Instead, it concluded that in this particular circumstance, based on the City’s General Plan and the general infeasibility of agriculture in the area, such mitigation was infeasible.

Likely can be distinguished for projects within the San Joaquin Valley.



CEQA REVIEW

- *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316
 - City certified EIR and approved specific plan authorizing 560 units on 200-acre site formerly used as egg farm.
 - EIR concluded specific plan would have significant impact on **agriculture**. City rejected mitigation (e.g. purchase of conservation easements) as infeasible in view of conclusion that agricultural operations in area were no longer economically viable due to urban pressures.
 - The City also rejected alternatives proposed to support continued agriculture on-site.
 - Record supported City's rejection of alternatives that called for preserving some agriculture on site; EIR did not need to analyze alternative with "optimal" number of residences while minimizing impacts of agriculture, since EIR analyzed a reasonable range.



CEQA Review

Conflicting, unpublished case law:

Friends of the Kangaroo Rat v. Department of Corrections (2003) 111 Cal.App.4th 1400 (opinion withdrawn on Feb. 18, 2004): Fifth District Court of Appeal held that the EIR for the development of a new prison facility was not required to consider conservation easements as mitigation for the loss of prime farmland caused by the project.



CEQA Review

Conflicting, unpublished case law:

South County Citizens for Responsible Growth et al. v. City of Elk Grove (2004)

2004 Cal.App. Unpub. LEXIS 1208: Third District Court of Appeal concluded that the issue of conservation fees as a mitigation measure should have been included in the EIR's discussion.



Sample Mitigation Language

Example A

The applicant must mitigate for the loss of prime farmland within the project area by preservation of off-site prime agricultural lands at a one to one (1:1) mitigation ratio. Agricultural mitigation shall be satisfied by the following:

Granting, in perpetuity, a farmland conservation easement, a farmland deed restriction, or other farmland conservation mechanism to, or for the benefit of, the [lead agency] and/or other qualifying entity acceptable and approved by the [lead agency]; and, the payment of fees sufficient to compensate for all administrative costs incurred by the [lead agency], easement holder inclusive of trust funds for the purpose of legal defense, monitoring and all other services provided.

CEQA Review

(Example A cont.)

Mitigation lands shall meet all of the following criteria to qualify as agricultural mitigation:

- 1. The soil quality (Storie Index of 60 or greater) of agricultural mitigation land shall be comparable to or better than the land which is converted to a non-agricultural zone or better;*
- 2. The land shall have an adequate water supply for the purposes of irrigation. The water supply shall be comparable to, or better than, the land that is the subject of a change in zoning classification, and shall be sufficient to support ongoing agricultural uses. The water supply shall be protected through legal instrument acceptable to City Counsel which ensures that water rights permanently remain with the mitigation land;*
- 3. The mitigation land shall be located in or adjacent to the Project area [could be more or less specific here].*
- 4. The mitigation land may overlap partially with existing habitat easement areas, as determined by the [lead agency] and approved by the California Department of Fish and Game; however, land previously encumbered by any other agricultural conservation easement shall not qualify, or be used for agricultural mitigation.*



Sample Mitigation Language

Example B

The project applicant shall cause to be set aside in perpetuity an amount equal to the number of acres converted by the project of contiguous, active agriculture acreage elsewhere in [____ County or within ____ miles of the project] through the purchase of development rights and the execution of an irreversible conservation or agricultural easement. These soils shall be permanently protected from future development via enforceable deed restrictions. Acreage already experiencing, or likely to experience, growth pressures shall be targeted. Soils and farming conditions shall be equivalent or superior to the project area. Protected acreage equal to the total acreage converted shall be set aside prior to commencement [or within 1 year] of any development activity.



Sample Mitigation Language

Example C

For each acre of the project area, the applicant shall contribute \$___ to a qualified land trust to be earmarked for the purchase of permanent agricultural easements in [___ County or within ___ miles of the project]. Soils and farming conditions shall be equivalent or superior to the project area. Protected acreage equal to the total acreage converted shall be set aside prior to commencement [or within 1 year of] of any development activity. In the alternative, if an ordinance requiring imposition of fees for mitigation for agricultural impacts is adopted before construction of the project begins, the applicant shall participate in that program, provided that the mitigation ratio must be at least 1:1.



FINAL THOUGHTS

- Look for a local program and local policies in General Plan that support protection of agriculture and agricultural mitigation.
- Use CEQA analysis and mitigation requirements in concert with other local requirements.
 - Be specific about significant cumulative effects and potential mitigation.
 - Look for overlaps between policies and programs protecting agricultural lands and other resource areas, such as open spaces and visual impacts.



Information Sources:

- American Farmland Trust

<http://www.farmland.org/reports/futureisnow/introductionX.html>

- Central Valley Farmland Trust

<http://www.valleyfarmland.org>

- Great Valley Center

http://www.greatvalley.org/agprograms/ag_program.aspx

- Department of Conservation

<http://www.consrv.ca.gov/DLRP/index.htm>