

# THE FARM AND RANCH LANDS PROTECTION PROGRAM: AN ANALYSIS OF THE FEDERAL POLICY ON UNITED STATES FARMLAND LOSS

*Michael R. Eitel*

I.	Introduction.....	591
II.	Federal Policy on Farmland Loss.....	593
	A. The Principal Causes of Farmland Loss .....	593
	B. Historical Analysis of Federal Policy on Farmland Loss ....	595
	C. Current Federal Policy on Farmland Loss: The Farm and Ranch Lands Protection Program .....	599
	D. The Perceived Pros and Cons of the Farm and Ranch Lands Protection Program.....	604
III.	Discussion .....	609
	A. The National Loss of Farmland Does Not Currently Deserve Federal Attention.....	609
	B. Without a Change in the Overall Federal Policy on Farmland Loss, the Farm and Ranch Lands Protection Program Will Not be an Effective Long-Term Federal Policy .....	622
IV.	Conclusion .....	629

## I. INTRODUCTION

Around the nation, scholars, politicians, activist groups, governmental officials and agencies have identified a national interest in protecting the nation's farmland. The concern over the loss of farmland has largely focused on the loss of prime and unique farmland.<sup>1</sup> The Natural Resources Conservation Service

---

1. NRCS, USDA, FARM AND RANCH LANDS PROTECTION PROGRAM FINAL ENVIRONMENTAL ASSESSMENT 1 (May 2003), *available at* [http://www.nrcs.usda.gov/programs/Env\\_Assess/FPP/Final%20FRPP%20EA%205-8-03.pdf](http://www.nrcs.usda.gov/programs/Env_Assess/FPP/Final%20FRPP%20EA%205-8-03.pdf).

(“NRCS”) has defined prime farmland as “land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides and labor, without intolerable soil erosion.”<sup>2</sup> Further, the NRCS has defined unique farmland as “land other than prime farmland that is used for the production of specific high value food and fiber crops.”<sup>3</sup> In 2000, twenty-two percent of the total North American land mass was fertile and capable of supporting agriculture, but only thirteen percent of that land was cultivated.<sup>4</sup> As of October 2002, the NRCS estimated “approximately 328 million acres of prime and unique farmland is located within the United States.”<sup>5</sup>

The concern over the loss of farmland stems primarily from the fears that our nation’s food security and well-being will be jeopardized, that the inherent values of agricultural lands will be lost, and that farmland loss will negatively impact all segments of the United States population.<sup>6</sup> With the concerns of farmland loss in mind, many authorities undertook to estimate the amount of farmland loss over the past few decades. One author estimated that “between 1982 and 1992, the U.S. lost 4.3 million acres of prime and unique farmland to other uses.”<sup>7</sup> The American Farmland Trust (“AFT”) estimates that between 1992 and 1997, 3.2 million acres of prime and unique farmland were converted to urban uses, with the total farmland loss during that period estimated to be over 11.2 million acres.<sup>8</sup> The NRCS believes that an average of 1.3 million acres of prime and unique farmland were lost annually between 1992 and 2002.<sup>9</sup>

As the USDA Economic Research Service (“ERS”) candidly admits:

Many different estimates have been made of the rate of urban [land] conversion. These range from about 0.75 million acres annually to 2.9 million acres, depending

---

2. *Id.*

3. *Id.*

4. See JOHN FARNDON, 4000 MORE THINGS YOU SHOULD KNOW 178 (Paula Borton ed., 2000).

5. NRCS, USDA, *supra* note 1, at 2.

6. *Id.* at 2-3.

7. Ruth Goldstein, Achieving Wildlife Objectives of the 1996 Farm Bill, Presentation at 1998 Farm Bill Workshop (Apr. 13, 1998) (on file with author).

8. LAWRENCE W. LIBBY & MICHAEL R. DICKS, RURAL-URBAN INTERFACE ISSUES: FARMLAND PROTECTION 1, at <http://www.farmfoundation.org/2002FB/6-3.pdf> (last visited Apr. 24, 2004).

9. NRCS, USDA, *supra* note 1, at 4.

on the source and time period. ERS estimates that urban conversion from all rural land, which includes everything not urban, at about 1.0 million acres per year.<sup>10</sup>

In addition to past estimates of farmland loss, numerous authorities have attempted to estimate the future amount of farmland loss to support claims that the nation's farmland is and will be in jeopardy. However, authorities disagree over the amount of projected farmland loss. The AFT states that "[e]ach year nearly two million acres of American farmland [will be] lost to sprawling development."<sup>11</sup> Another scholar concludes that approximately 645,000 acres of the nation's most productive farmland will be converted to urban uses each year.<sup>12</sup> Lastly, the NRCS projects that "approximately 4 million acres of prime farmland will be lost to nonagricultural uses between 2002 and 2007," amounting to approximately 667,000 acres per year.<sup>13</sup> Commentators almost unanimously agree that the United States is losing farmland yearly, but disagree on the appropriate solution to the problem.

The threat of losing valuable farmland in the United States and the consequences of farmland loss on various sectors of society has fueled political debate and political action at both the state and federal level. The purpose of this paper is to begin an exploration into the current federal policy on United States farmland loss, including the principle causes of farmland loss, the past and present federal policy on farmland loss, the perceived benefits and detriments of the current federal policy, and the overall effectiveness of current federal policy as a long-term strategy to protect our nation's farmland.

## II. FEDERAL POLICY ON FARMLAND LOSS

### A. *The Principal Causes of Farmland Loss*

In attempting to understand whether current federal policy on protecting farmland is effective and adequate, the causes of farmland loss must first be un-

---

10. DANIEL HELLERSTEIN ET AL., USDA, FARMLAND PROTECTION: THE ROLE OF PUBLIC PREFERENCES FOR RURAL AMENITIES 4 (Oct. 2002), *available at* <http://www.ers.usda.gov/publications/aer815/aer815.pdf>.

11. AM. FARMLAND TRUST, OUR POLICY WORK AT AFT, *at* <http://www.farmland.org/policy/issues.htm#fpp> (last visited Apr. 24, 2004).

12. LIBBY & DICKS, *supra* note 8, at 1.

13. NRCS, USDA, *supra* note 1, at 9.

derstood. While no one factor is dispositive, several factors stand out as the principle propellants behind farmland loss.

*Sprawl.* Despite the numerous labels attached to a single concept (e.g., urban sprawl, suburban sprawl, suburbanization) sprawl is generally defined as “the rural acres lost as an urbanized area spreads outward over a period of time.”<sup>14</sup> Although the exact nature of sprawl might be incapable of accurate definition, it is generally seen as “random development characterized by poor accessibility of related land uses such as housing, jobs, and services like schools and hospitals,” and generally looks like “scattered, isolated developments that leapfrog over the landscape.”<sup>15</sup>

Sprawl is typically identified by ten traits:

[1] unlimited outward extension, [2] low-density residential and commercial settlements, [3] leapfrog development, [4] fragmentation of powers over land-use among many small localities, [5] dominance of transportation by private automotive vehicles, [6] no centralized planning or control of land-uses, [7] widespread strip commercial development, [8] great fiscal disparity among localities, [9] segregation of types of land-uses in different zones, and [10] reliance mainly on the trickle-down or filtering process to provide housing to low-income households.<sup>16</sup>

Sprawl results when Americans rapidly move to the countryside, seeking open space, relief from congested urban places, and a different lifestyle.<sup>17</sup> Initially, sprawl into rural areas comes in the form of large-lot developments,<sup>18</sup> expanding residential suburbs,<sup>19</sup> or low density housing.<sup>20</sup> More (nonbasic) businesses and stores are required to serve the needs of new residents.<sup>21</sup> Because new residents demand familiar urban center businesses that provide various goods and services, commercial development into rural areas can sometimes match the

---

14. LEON KOLANKIEWICZ & ROY BECK, WEIGHING SPRAWL FACTORS IN LARGE U.S. CITIES 7 (2004).

15. Charles W. Schmidt, *The Specter of Sprawl*, 106 ENVTL. HEALTH PERSPECTIVE ¶ 5 (June 1998), available at <http://ehpnet1.niehs.nih.gov/docs/1998/106-6/focus.html>.

16. PLANNING COMM’R J., SPRAWL GUIDE, HOW DO YOU DEFINE SPRAWL?, at <http://www.plannersweb.com/sprawl/define.html> (last visited Apr. 24, 2004).

17. LIBBY & DICKS, *supra* note 8, at 1.

18. *See id.*

19. NRCS, USDA, FARM AND RANCH LANDS PROTECTION PROGRAM, DRAFT ENVIRONMENTAL ASSESSMENT 3 (2002).

20. Ilene Olson, *Sprawl to Spread*, WYO. TRIBUNE EAGLE, June 27, 2001, available at <http://www.wyomingnews.com/news/more.asp?storyID=1148&=arch=true> (last visited Apr. 24, 2004).

21. Alexander Vias, Remarks at Tenth Annual Conference at the Rocky Mountain Land Use Institute (Apr. 20, 2001).

quantity of residential development.<sup>22</sup> Further, the rapid growth of rural areas also requires that communities provide adequate roads, schools, and utilities.<sup>23</sup>

*Population Growth.* Population growth is seen as a threat to farmland preservation because of the increased potential for accelerated movement, or growth, into rural areas. Current estimates of the United States population range from 280,000,000 people<sup>24</sup> to 281,000,000 people.<sup>25</sup> By 2050, “the [United States] population is projected to grow by more than 40 percent, from 283 million to 404 million [people].”<sup>26</sup> Simply put, as more people inhabit the United States, more pressure will be placed on the use of rural lands because “[m]uch of the growth will not [take place in] existing cities or suburbs – but in rural areas.”<sup>27</sup>

*Farm Economics.* The profitability of an agricultural operation is a key contributor to farmland loss for several reasons. First, the increased quantity of human movement into rural areas places a high demand for rural agricultural lands, and agricultural operators face increasing financial pressure to sell farmland. Applying rudimentary economic principles, when a commodity (e.g., agricultural land) is in fixed supply and the demand for that commodity grows, a willing buyer, under a traditional free market system, will be required to pay an increased price for the commodity.<sup>28</sup> Consequently, an agricultural operation that sustains low profits may provide the agricultural operator with an incentive to sell land for income or operating capital.<sup>29</sup> In economic jargon, “the rational land owner will invest units of land to the point at which marginal value product of land (e.g. agriculture) is equal to the return to that land in an alternative use (e.g. house lots).”<sup>30</sup>

Agriculture can be and often is unprofitable because of the uniqueness of the industry as compared to non-agricultural industries. For example, agriculture can be unprofitable because an operator is exposed to uncontrollable weather conditions and “unpredictable changes in market conditions (especially prices)

---

22. *Id.*

23. *Id.*

24. FARNDON, *supra* note 4, at 142.

25. KOLANKIEWICZ & BECK, *supra* note 14, at 33.

26. *Id.* at 16.

27. Louis Aguilar, *Mega-Sprawl Ahead CU Forecast for West's Future: 48 Million More People by 2050*, DENVER POST, June 27, 2001, at A1.

28. See LAWRENCE W. LIBBY, AM. FARMLAND TRUST, FARMLAND PROTECTION POLICY: AN ECONOMIC PERSPECTIVE (Jan. 1997), at <http://www.aftresearch.org/researchresource/wp/wp97-1.html>.

29. See LIBBY & DICKS, *supra* note 8, at 3.

30. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

between the time they plant their crops and the time the crops are harvested and marketed.”<sup>31</sup> Whatever the reason, if an agricultural operation is not sufficiently profitable, the human sprawl into agricultural areas will raise the value and demand for land to a point where the operator loses the financial incentives to keep part or all of his or her land in agricultural production.<sup>32</sup> In sum, farmers and ranchers, like many other people, are primarily motivated by money when deciding which course of action to take.<sup>33</sup>

Agricultural operators who realize low profits may also discourage other persons from entering the agricultural field, lowering the demand for agricultural land among agricultural participants.<sup>34</sup> For example, “[t]he largest increase in number of farms reported in the 1998 Census of Agriculture was in the category ‘residential/lifestyle’ farms,” indicating that the amount of economically harvestable land is being reduced.<sup>35</sup> The low profitability of agricultural operations is further evidenced by the fact that the majority of modern agricultural operators, especially family and/or small operations,<sup>36</sup> rely on off-farm employment to remain profitable.<sup>37</sup> According to the USDA-ERS, “[a] limited number of households depend on farming for a majority of their farm household income.”<sup>38</sup> Consequently, beginning or continuing farmers and ranchers will be less willing to pay increased or even nominal prices for agricultural land if they cannot earn sufficient profits from keeping land in agricultural production.

#### B. *Historical Analysis of Federal Policy on Farmland Loss*

Since the early 1900s, political behavior has indicated a concern that loss of farmland is a national issue which deserves some level of federal attention. The federal government began to explore methods of identifying and protecting important farmlands in 1934 when the Natural Resources Board proposed a na-

---

31. Michael R. Taylor, *The Emerging Merger of Agricultural and Environmental Policy: Building a New Vision for the Future of American Agriculture*, 20 VA. ENVTL. L.J. 169, 174 (2001).

32. Press Release, United States Senator Patrick Leahy, Maintaining our Working Landscape Through the Farmland Protection Program (July 21, 1999), available at <http://leahy.senate.gov/press/199907/990721.html>.

33. See LIBBY & DICKS, *supra* note 8, at 3.

34. *Id.* at 2.

35. *Id.*

36. ASHOK MISHRA ET AL., USDA, AGRICULTURAL OUTLOOK: ASSESSING THE ECONOMIC WELL-BEING OF FARM HOUSEHOLDS 33 (2002).

37. LIBBY & DICKS, *supra* note 8, at 2.

38. MISHRA ET AL., USDA, *supra* note 36, at 33.

tional system for developing county farmland plans.<sup>39</sup> However, the Natural Resources Board's efforts never quite panned out, and the federal government exhibited no significant signs of willingness to engage in farmland protection for close to forty years.<sup>40</sup> In 1972 and 1973, Washington Senator Henry Jackson introduced a bill into Congress entitled the Land Use Policy and Planning Assistance Act ("LUPPAA").<sup>41</sup> The LUPPAA was intended "to encourage systematic attention to development patterns and to bring some consistency to state efforts."<sup>42</sup> Congress rejected the LUPPAA, partially due to the belief that farmland protection was primarily a state or local matter.<sup>43</sup>

The USDA breathed life into a dying issue in 1976 when it issued a policy statement to its brethren agencies, pleading for them to consider alternatives to agency action which directly or indirectly contributed to the conversion of prime and unique farmland.<sup>44</sup> Following the USDA's lead, the President's Council on Environmental Quality ("CEQ") released a similar policy statement which encouraged federal agencies to consider farmland loss when they prepared environmental impact statements.<sup>45</sup>

In 1978, the USDA assumed center stage on the farmland protection issue by publishing a memorandum which directed each agency within the USDA to review and revise policies and rules that cause or encourage farmland conversion.<sup>46</sup> In order to justify the new USDA policy, the Secretary of Agriculture joined with the CEQ to establish the National Agricultural Lands Study ("NALS"), a commission directed to study and document the causes and extent of farmland loss.<sup>47</sup> Approximately three years later, the NALS report was com-

---

39. See LIBBY & DICKS, *supra* note 8, at 2.

40. See *id.*

41. See Land Use Policy and Planning Assistance Act of 1972, S. 632, 92d Cong. (passed the Senate on Sept. 19, 1972). The House version of the bill, the National Land Use Policy Act of 1972, H.R. 721, 92d Cong. (1972), was not acted on. See 118 Cong. Rec. H15278 (daily ed. Sept. 19, 1972). In 1973, Senator Jackson reintroduced the legislation, which again passed the Senate. See S. 268, 93d Cong. (1973). The House version, however, was defeated. See Land Use Planning Act, H.R. 10294, 93d Cong. (1973); 120 Cong. Rec. H5019, H5042 (daily ed. June 11, 1974).

42. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

43. LIBBY & DICKS, *supra* note 8, at 2.

44. FARMLAND INFO. CTR., FARMLAND PROTECTION POLICY ACT: FACT SHEET (Sept. 1998), at [http://www.farmlandinfo.org/documents/29480/FS\\_FPPA\\_9-98.pdf](http://www.farmlandinfo.org/documents/29480/FS_FPPA_9-98.pdf).

45. See *id.*; see also, National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2000) (requiring federal agencies to prepare environmental impact statements for major federal actions that will significantly impact the environment).

46. FARMLAND INFO. CTR., *supra* note 44.

47. See Vivian Quinn, *Preserving Farmland with Conservation Easements: Public*

plete and the findings supported USDA policy, finding all farmland loss a serious national problem, partially due to the overall breadth of farmland conversion and the practice of numerous federal agencies funding activities that contribute to farmland conversion.<sup>48</sup>

The completed NALS report also spurred congressional action, prompting Congress to enact the Farmland Protection Policy Act ("FPPA").<sup>49</sup> Congress intended enactment of the FPPA would "minimize the extent to which [f]ederal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses, and to assure that [f]ederal programs are administered in a manner that, to the extent practicable, will be compatible with [s]tate . . . and private programs and policies to protect farmland."<sup>50</sup>

The FPPA is similar to the National Environmental Protection Act and requires a federal agency to examine the impacts of and alternatives to any agency action that may convert farmland. The FPPA further allows, but does not require, an agency to withhold funding for a project if the agency finds that farmland will be converted.<sup>51</sup>

Nine years later, Congress authorized the Agricultural Resource Conservation Demonstration Program ("ARCDP").<sup>52</sup> Congress passed the ARCDP partially due to the ineffectiveness of the FPPA in combating farmland loss. The FPPA only mandated agency process, not substantive results.<sup>53</sup> The ARCDP authorized the federal government to provide state and local farmland protection programs with guaranteed loans and subsidized interest payments;<sup>54</sup> the ARCDP was superseded in 1996 by enactment of the Farmland Protection Program contained in the Federal Agriculture Improvement and Reform Act ("FAIR Act") of 1996.<sup>55</sup> The Farmland Protection Program, currently called the Farm and Ranch Lands Protection Program ("FRPP"),<sup>56</sup> is the program which remains in effect today.

---

*Benefit or Burden?*, 1992-93 ANN. SURV. AM. L. 235, 235 (1994).

48. See *id.*; see also FARMLAND INFO. CTR., *supra* note 44.

49. 7 U.S.C. §§ 4201-4209 (2000); see, e.g., Quinn, *supra* note 47, at 235.

50. 7 U.S.C. § 4201(b).

51. *Id.* §§ 4201-4202.

52. See Farms for the Future Act of 1990, 42 U.S.C. § 4201 (2000).

53. FARMLAND INFO. CTR., *supra* note 44.

54. Farmland Protection Program, 61 Fed. Reg. 43,226, 43,227 (Aug. 21, 1996).

55. See, e.g., Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. §§ 7201-7218 (2000).

56. See Press Release, NRCS, USDA Seeks Comments on Farm and Ranch Lands Protection Program (Oct. 29, 2002), at <http://www.nrcs.usda.gov/news/releases/2002/021029.html> (according to NRCS Chief Bruce Knight, the program's name was changed "to more accurately



C. *Current Federal Policy on Farmland Loss: The Farm and Ranch Lands Protection Program.*

With the enactment of the FRPP in the 1996 FAIR Act, Congress responded to the growing concern that the nation's farmland was being lost at an alarming rate.<sup>57</sup> Congress enacted the FRPP to compensate farmers and ranchers who keep their land in agricultural production.<sup>58</sup> Under the FRPP, the federal government provides partial funding for the acquisition of conservation easements, or the right to prevent development on voluntarily participating agricultural operators' lands.<sup>59</sup>

In 1996, Congress established the goal of protecting between 170,000 and 340,000 acres of prime, unique, and other productive agricultural lands through 2002<sup>60</sup> and identified the program's purpose, which was to help farmers and ranchers keep their land in agriculture while reducing the loss of agricultural land conversion.<sup>61</sup> By reauthorizing the FRPP in 2002,<sup>62</sup> Congress intended that the program should "continue to protect the Nation's best working agricultural lands," but that "the purpose of the program has been expanded to also include grazing, pasture, range, and forestland that is a part of an agricultural operation."<sup>63</sup> In order to continue protecting agricultural lands, the FRPP contains provisions on how the program will operate, what land is eligible, what entities are eligible to receive federal funding to purchase interests in land, and how the federal government will determine funding priorities among various applicants to the program. The program has been funded and the government has allocated money to protect prime and unique farmland under the FRPP since 1996.

The NRCS is the agency charged with establishing and administering the FRPP.<sup>64</sup> The NRCS is currently in the process of developing final rules for the FRPP; thus, this paper will address the FRPP provisions under the assumption

---

reflect that both farms and ranches are eligible for assistance, the program's purpose, which is to protect prime, unique and important soil from conversion to nonagricultural uses through the purchase of conservation easements, remains the same"). This paper will use the acronym 'FRPP' when referring to both the 1996 and 2002 versions of the federal program.

57. *See, e.g.*, 16 U.S.C. § 3830 (2000).

58. *See id.*

59. *See id.*

60. *Id.*

61. *See* 16 U.S.C.A. § 3838i (West Supp. 2003).

62. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

63. H.R. CONF. REP. NO. 107-424, at 502 (2002).

64. 16 U.S.C.A. § 3838i(a).

that the proposed regulations will become final regulations.<sup>65</sup> Under the FRPP, the NRCS can implement the “FRPP in any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.”<sup>66</sup>

The FRPP sets up a system to compensate landowners for keeping their land in agricultural production. Under the FRPP, landowners<sup>67</sup> voluntarily enter into formal agreements with the NRCS, which enables the NRCS to partially fund the purchase of conservation easements<sup>68</sup> or other interests in eligible land<sup>69</sup> that are “subject to a pending offer from an eligible entity.”<sup>70</sup> Under the formal agreements, the NRCS provides matching funds to eligible entities to purchase conservation easements or other interests in land.<sup>71</sup> The NRCS cannot provide more than fifty percent “of the appraised fair market value of the conservation easement or other interest in eligible land.”<sup>72</sup> An eligible entity is required to match the NRCS contribution<sup>73</sup> by paying at least twenty-five percent of the purchase price in cash, but can pay up to fifty percent of the purchase price in cash if

---

65. Farm and Ranch Lands Protection Program, 67 Fed. Reg. 65,907 (proposed Oct. 29, 2002) (to be codified at 7 C.F.R. pt. 1491).

66. *Id.*

67. *Id.*

68. *Id.* (“Conservation easement means a voluntary, legally recorded restriction, in the form of a deed, on the use of property, in order to protect resources such as agricultural lands, historic structures, open space, and wildlife habitat.”).

69. *Id.* (“Other interests in land include any right in real property recognized by State law, including fee title. FRPP funds will only be used to purchase other interests in land with prior approval from the Chief [of the NRCS].”).

70. 16 U.S.C.A. § 3838i(a) (West Supp. 2003).

71. *Id.* § 3838h(1)(A)-(B); *see also* Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,910 (proposed Oct. 29, 2002) (to be codified at 7 C.F.R. pt. 1491).

72. *Id.* § 3838i(c)(1)(A); *see also* Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,910.

Fair market value of the conservation easement is ascertained through standard real property appraisal methods. Fair market value is the amount in cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure of time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer. Neither the seller nor the buyer act under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.

*Id.*

73. Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,912.

its contribution does not exceed the NRCS contribution.<sup>74</sup> As part of the eligible entity's contribution, a landowner may donate "up to 25 percent of the appraised fair market value of the conservation easement."<sup>75</sup> Further, "[a]s a condition for participation, a conservation plan will be developed by NRCS in consultation with the landowner and implemented according to the NRCS Field Office Technical Guide and approved by the local conservation district."<sup>76</sup>

In order to participate in the FRPP, a landowner must own eligible land.<sup>77</sup> Eligible land is defined as ranch or farm land that "has prime, unique, statewide, or locally important soil"<sup>78</sup> or "contains historical or archaeological resources"<sup>79</sup> and is "subject to a pending offer"<sup>80</sup> for purchase from an eligible entity.<sup>81</sup> Further, eligible land can be cropland, rangeland, grassland, pasture land, and "forest

---

74. *Id.*

75. *Id.*

76. *Id.* at 65,910-11.

Conservation plan means the document that—[a]pplies to highly erodible cropland; [d]escribes the conservation system applicable to the highly erodible cropland...[and] [i]s approved by the local soil conservation district in consultation with the local committees established under Section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. § 5909h(b)(5)) and the Secretary, or by the Secretary.

*Id.*

77. Farm Security & Rural Investment Act of 2002, 16 U.S.C.A. § 3838i(a) (West Supp. 2003).

78. Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,910-11.

Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, without intolerable soil erosion, as determined by the Secretary. . . . Unique farmland is land that is used for the production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods.

*Id.*

79. *Id.* at 65,910 ("Historical and archeological resources must be: [l]isted in the National Register of Historic Places . . . or [f]ormally determined eligible for listing in the National Register of Historic Places . . . or [f]ormally listed in the State or Tribal Register of Historic Places.").

80. *Id.* (defining a pending offer as "a written bid, contract, or option extended to a landowner by an eligible entity to acquire a conservation easement before a legal title to these rights has been conveyed for the purpose of limiting non-agricultural uses of the land").

81. 16 U.S.C.A. § 3838h(1)(A).

land that is an incidental part of an agricultural operation.”<sup>82</sup> In addition, eligible land must be privately owned.<sup>83</sup> Entire farms or ranches can be enrolled in the program, and all lands must have valid appraisals of their fair market value.<sup>84</sup>

The eligible entity matches federal funds to purchase conservation easements or other interests in land, such as fee title to the property. If the eligible entity purchases a conservation easement, the entity must also “hold, manage, and enforce [the terms of] the easement.”<sup>85</sup> An eligible entity is “any agency of any State or local government or an Indian tribe (including a farmland protection board or land resource council established under state law)” or a charitable organization as defined by the Internal Revenue Service.<sup>86</sup> Eligible entities must show “[a] commitment to long-term conservation of agricultural lands,” be “capable to acquire, manage, and enforce easements,” employ a “[s]ufficient number of staff that will be dedicated to monitoring and easement stewardship,” and must have sufficient working capital.<sup>87</sup> An eligible entity is required to hold the easement in perpetuity, unless prohibited by state law,<sup>88</sup> and a “[f]ederal contingent right interest in the property must be included in each easement deed for the protection of the [f]ederal investment.”<sup>89</sup>

The NRCS determines FRPP participants based on an application and selection process. The process begins when the NRCS publishes a “Request for Applications” in the Federal Register after Congress has appropriated sufficient

---

82. *Id.* § 3838h(2)(B).

83. Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,911 (“[The] NRCS will not enroll land in FRPP that is owned in fee title by an agency of the United States or State or local government, or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use, unless otherwise determined by the Secretary.”).

84. *Id.*

85. *Id.*

86. 16 U.S.C.A. § 3838h(1).

87. *Id.*

88. *Id.* (requiring that if state law prohibits the conveyance of conservation easements in perpetuity, then the land will be classified as “other interests in land” and the approval of the NRCS Chief will be needed to fund the acquisition of the easement).

89. Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,910.

[A] [c]ontingent right is an interest held by the United States, which the United States may exercise under specific instances in order to enforce the terms of the conservation easement or hold title to the easement . . . [The federal government will exercise the contingent right if the] eligible entity . . . abandon[s] or attempt[s] to terminate the conservation easement . . . [or] if the eligible entity fails to uphold the easement or attempts to transfer the easement without first securing the consent of the Secretary.

*Id.* at 65,910, 65,912.

funding for the program.<sup>90</sup> The landowner then has to submit an application to the state NRCS conservationist.<sup>91</sup> Once the state NRCS conservationist has received all applications, the conservationist reviews the applications and ranks them according to state ranking criteria.<sup>92</sup> After the state ranking criteria has been utilized, the state NRCS conservationist reviews the applications according to the national ranking criteria, developed by the Chief of the NRCS. Some general examples of the state and national ranking criteria include the amount of prime, unique, or other important soils that will be protected, the total acreage to be protected, the number of historic or archeological resources, the threat of conversion to the land, whether the easement is permanent, and other similar factors.<sup>93</sup> Lastly, the state conservationist submits advice, through the state technical committee, to the Chief of the NRCS for national review and a final selection of FRPP participants and funding allocations.<sup>94</sup>

As of 2002, the federal government accepted proposals and provided funds for FRPP projects in 1996, 1997, 1998, 2001, and 2002.<sup>95</sup> To allow the NRCS to implement the FRPP, Congress allocated a portion of \$35 million in 1996,<sup>96</sup> \$1.92 million in 1997,<sup>97</sup> \$17.28 million in 1998,<sup>98</sup> \$30 million in 2001,<sup>99</sup> and \$50 million in 2002.<sup>100</sup> In 2002, Congress authorized yearly future funding for the FRPP, providing for \$100 million in 2003, \$125 million in 2004 and 2005, \$100 million in 2006, and \$97 million in 2007.<sup>101</sup>

The FRPP has been protecting valuable farmland since its inception in 1996. In the first two years of operating under the FRPP, the federal government contracted with eighteen entities, and the federal government paid \$16.2 million

---

90. *Id.* at 65,911; *see also* Farmland Protection Program, 68 Fed. Reg. 16,253 (Apr. 3, 2003) (Congress has recently released one hundred million dollars to the NRCS to implement the FRPP, and the NRCS has published a Request for Applications in the *Federal Register*).

91. Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,911.

92. *Id.*

93. *Id.*

94. *Id.* at 65,912.

95. *See* Notice of Request for Proposals, 61 Fed. Reg. 43,226 (Aug. 21, 1996); Notice of Request for Proposals, 62 Fed. Reg. 28,836 (May 28, 1997); Notice of Request for Proposals, 63 Fed. Reg. 13,615 (Mar. 20, 1998); Notice of Request for Proposals, 66 Fed. Reg. 6566 (Jan 22, 2001); Notice of Request for Proposals, 67 Fed. Reg. 37,756 (May 30, 2002).

96. Notice of Request for Proposals, 61 Fed. Reg. at 43,227.

97. Notice of Request for Proposals, 62 Fed. Reg. at 28,836.

98. Notice of Request for Proposals, 63 Fed. Reg. at 13,615.

99. Notice of Request for Proposals, 66 Fed. Reg. at 6566.

100. Notice of Request for Proposals, 67 Fed. Reg. at 37,756.

101. 16 U.S.C.A. § 3841(a)(4)(A)-(E) (West Supp. 2003).

to help acquire the conservation easements.<sup>102</sup> The government indicated that approximately eighty thousand acres of farmland were protected between 1996 and 1997, and the government estimated that the total easement value, which combines the federal government's share, the eligible entity's share, and the landowner's share, was approximately \$134 million.<sup>103</sup> In 1998, the federal government contracted with thirty-two entities and paid approximately \$17.3 million to help purchase conservation easements.<sup>104</sup> The government indicated that approximately 41,169 acres of farmland were protected and estimated that the total easement value was approximately \$88.4 million.<sup>105</sup> After a brief two-year hiatus, Congress again funded the FRPP in 2001 and 2002.<sup>106</sup> From 1996 to 2002, the federal government allocated nearly \$99 million to state and local governments, helping permanently protect nearly 108,000 acres of farmland.<sup>107</sup>

D. *The Perceived Pros and Cons of the Farm and Ranch Lands Protection Program*

The perceived benefits and shortcomings of the FRPP, as expressed by scholars, policy analysts, commentators, and governmental officials and agencies is important when attempting to understand how the FRPP works and ascertain the long term effectiveness of the FRPP as federal farmland protection policy. The various commentators on the FRPP, when identifying the pros and cons of the program, generally focus on three areas where the FRPP will have the most substantial effect: The land, the agricultural operators, and the public. This subsection will briefly discuss the arguments of various interested parties as they relate to the functioning of the FRPP.

*The Land.* Economists maintain that the FRPP will help protect the nation's farmland and will slow the pace of farmland loss.<sup>108</sup> Because farmers are paid to place conservation easements on their land, they will benefit economically by keeping valuable agricultural land in agricultural production.<sup>109</sup> The

---

102. Notice of Request for Proposals, 63 Fed. Reg. at 13,615.

103. *Id.*

104. USDA, USDA FARMLAND PROTECTION PROGRAM DISTRIBUTION OF FUNDS FISCAL YEAR 1998 (1998) (on file with Journal).

105. *Id.*

106. *See* Farm and Ranch Lands Protection Program, 67 Fed. Reg. 65,907 (proposed Oct. 29, 2002) (to be codified at 7 C.F.R. pt. 1491).

107. *See* NRCS, USDA, *supra* note 19, at 1.

108. *See generally* LIBBY & DICKS, *supra* note 8 (discussing federal policies designed to protect land for farming).

109. *See* LELA LONG, AM. FARMLAND TRUST, SAVING OPEN SPACES: PUBLIC SUPPORT FOR

result, according to Vice President Al Gore, is that “[o]ur kids will see horses, cows and farms outside, not just in books and movies.”<sup>110</sup>

Further, since state and local money can be leveraged with federal FRPP money, state and local governments have an incentive to develop and improve existing state-run conservation easement programs, which may further aid in the protection of farmland.<sup>111</sup> For example, Colorado has implemented a program that utilizes lottery funds to aid in protecting open space heritage by providing funding for the acquisition of FRPP conservation easements and other open space initiatives.<sup>112</sup> Colorado’s ability to provide meaningful assistance to local governments and land trusts, in combination with the federal FRPP money, results in more opportunities to protect existing farmland.<sup>113</sup>

Commentators also state that landowners will become better stewards of their land by participating in the FRPP.<sup>114</sup> Because a landowner will benefit economically by receiving compensation for keeping his or her land in agricultural production, landowners will be more likely to participate in the FRPP. As a condition to participating in the FRPP, the federal government requires that a conservation plan be implemented on the participating land.<sup>115</sup> The conservation plan must be approved by the local soil conservation district and requires a landowner to comply with a conservation system developed by the landowner and the NRCS.<sup>116</sup> The conservation plan should address and “describe the decisions of the [landowner] with respect to location, land-use, tillage systems, and conservation treatment measures and schedules.”<sup>117</sup> Because a landowner gains economically from participating in the FRPP, the landowner will have an incentive to participate, and will be obligated to implement and maintain conservation practices on his or her land.<sup>118</sup>

---

FARMLAND PROTECTION, POLICY IMPLICATIONS (Apr. 6, 1999), at <http://www.aftresearch.org/researchresource/sos/policy.html>.

110. Press Release, USDA, Vice President Gore Announces \$17.2 Million for Farmland Preservation (Sept. 2, 1998), available at <http://www.usda.gov/news/releases/1998/09/0356>.

111. Press Release, American Farmland Trust, Farmland Protection Program Emerges from 2002 Farm Bill as Diamond in the Rough (May 8, 2002), at [http://www.farmland.org/news\\_2002/050802\\_natl.htm](http://www.farmland.org/news_2002/050802_natl.htm).

112. See COLO. CONST. art. XXVII.

113. See Julie Shackelford, *Op-Ed: Farm Bill Program Could Save Texas’ Family Lands*, U.S. NEWSWIRE, June 10, 2002, at <http://www.usnewswire.com/topnews/first/0610-144.html>.

114. *Id.*

115. Farm and Ranch Lands Protection Program, 67 Fed. Reg. 65,907 (Proposed Oct. 29, 2002) (to be codified at 7 C.F.R. pt. 1491).

116. *Id.* at 65,908.

117. 16 U.S.C.A. § 3801(a)(2) (West Sup. 2003).

118. See Farm and Ranch Lands Protection Program, 67 Fed. Reg. at 65,907 (obligating

However, other analysts maintain that the FRPPs focus on protecting prime and unique farmland may limit the effectiveness of the program because the FRPP does not address other open spaces that are being lost.<sup>119</sup> Under the FRPP, if the NRCS does not designate a parcel of agricultural land as prime and unique farm or ranch land, then the landowner is ineligible to participate in the program.<sup>120</sup> Commentators argue that sprawl will continue to move into rural areas where the FRPP has not, nor cannot, provide funding to protect agricultural land from development. According to the Mackinac Center for Public Policy, “unless all open land is protected from development, development will simply move further out into rural areas and exacerbate the already negative perception of sprawl.”<sup>121</sup> Thus, the FRPPs effectiveness in preserving agricultural lands by partially combating sprawl is jeopardized by a policy that does not focus on all open spaces that are being lost.

Additionally, many critics argue that the FRPP is defective because the program only focuses on protecting the land, not other aspects of need for farmers.<sup>122</sup> Farmers are economically strained not only by sprawling development which raises land value, but also by market pressures that reduce the sales price of commodities, high health care and other insurance premiums, an increased potential for negligence and other liability costs, steep costs for improving machinery, irrigation, and other operational improvement measures, and by other costs associated with being an agricultural producer.<sup>123</sup> In sum, “[a]griculture, like any business, is affected by the impact of regulatory reform, risk management tools, trade, taxes, health care costs, and much more.”<sup>124</sup> Consequently, some commentators conclude that “[a] program that focuses on the land but overlooks the management part of the farm is bound to fail.”<sup>125</sup>

---

the NRCS to monitor the conservation plan on participating agricultural lands and ensuring that the conditions of the conservation plan are met).

119. SAMUEL R. STALEY, MACKINAC CTR. FOR PUB. POLICY, URBAN SPRAWL AND THE MICHIGAN LANDSCAPE: A MARKET-ORIENTED APPROACH 42 (Oct. 1998), *available at* <http://www.mackinac.org/archives/1998/s1998-06.pdf>.

120. *Id.*

121. *Id.*

122. ALCORN STATE UNIV. COOP. EXTENSION PROGRAM, SMALL FARM RISK MANAGEMENT, *available at* <http://www.alcorn.edu/outreach/farmmanagement/sfrisk.htm> (last visited Apr. 4, 2004).

123. *See, e.g., id.*

124. Press Release, United States Senator Rick Santorum, Farm Bill Isn't Perfect for Pennsylvania (Feb. 15, 2002), *available at* <http://santorum.senate.gov/columns/col020215.html>.

125. LIBBY, AM. FARMLAND TRUST, *supra* note 28.



*Agricultural Operators.* In order for the FRPP to work effectively, observers argue that agricultural producers must be willing to grant conservation easements on their land. The FRPP is popular among agricultural producers, which is not surprising considering the public is paying them to retain valuable farmland. According to the AFT, the FRPP is oversubscribed by six hundred percent, meaning that many more farmers want to participate in the program than the program is capable of funding.<sup>126</sup> Producers also support the program because participation in the program “free[s] up capital for producers to reinvest in their operations,” which allows producers to plan for retirement, reduce debt, or implement value-added functions on their operation.<sup>127</sup> Further, by participating in the FRPP, agricultural producers may be able to make more efficient and beneficial decisions regarding the future of their operations.<sup>128</sup>

Conversely, other observers maintain that once a FRPP conservation easement is granted, the landowner may not have an incentive to accumulate cash reserves and manage the operation proficiently. The FRPP conservation easement isolates the farmer from developmental pressure and the removal of development rights reduces the risk that the market value of the land will exceed an agricultural operation’s market value.<sup>129</sup> Because a landowner is isolated from risk, there may not be a need to accumulate cash reserves for unexpected events occurring on the operation. The possible failure to accumulate cash reserves combined with a future economic burden, such as death of a family member, fire, flood, crop damage, catastrophic illness, may lead to the demise of the agricultural operation.<sup>130</sup> Thus, the FRPP may be counterproductive to protecting farmland because it isolates the farmer from certain risks, and if a landowner fails to manage the agricultural operation properly, the landowner may be unable to ultimately retain the protected farmland.<sup>131</sup>

In addition, FRPP requirements, such as the mandate of implementing a conservation plan, may burden the landowners.<sup>132</sup> Landowners may be burdened because the protection of certain farmland may reduce the fair market value of

---

126. AM. FARMLAND TRUST, ISSUE BRIEF: FARMLAND PROTECTION PROGRAM, at [http://www.farmland.org/policy/issues\\_fpp.htm](http://www.farmland.org/policy/issues_fpp.htm) (last visited Apr. 24, 2004).

127. FARMLAND INFO. CTR., *supra* note 44.

128. *See* Press Release, United States Senator Patrick Leahy, Statement of Senator Patrick Leahy Maintaining our Working Landscape Through the Farmland Protection Program, Senate Committee On Agriculture, Nutrition and Forestry Hearing (July 21, 1999), available at <http://leahy.senate.gov/press/19990721.html>.

129. *See, e.g.*, MISHRA ET AL., USDA, *supra* note 36, at 31, 33.

130. *See, e.g.*, ALCORN STATE UNIV. COOP. EXTENSION PROGRAM, *supra* note 122.

131. *See* MISHRA ET AL., USDA, *supra* note 36, at 31, 33.

132. FARMLAND INFO. CENTER, *supra* note 44.

their land. The reduction in land value may result in a decrease of the landowner's total asset base.<sup>133</sup> Further, agricultural producers may feel that participating in the FRPP is a nexus to greater federal regulatory control over the agricultural sector because "[e]asements are just the 'nose under the tent;' next will be the direct incursions into the private property rights of the landowner."<sup>134</sup> Consequently, despite economic gain and land security, an informed landowner may be less willing to participate in the FRPP because they believe the burdens imposed under the FRPP outweigh the benefits of participation, thereby decreasing the effectiveness of the FRPP.

*The Public.* Commentators state that public support, in particular taxpayer support, is key to the success of the FRPP because the taxpayers provide the funds necessary to protect farmland. By utilizing taxpayer money, the FRPP may increase national awareness concerning farmland loss and educate the public on the benefits of protecting farmland.<sup>135</sup> The public, utilizing a more informed decision making process, may more effectively voice their approval or disapproval of the federal policy and make more efficient land-use decisions.<sup>136</sup> Thus, the public (i.e., taxpayers) may determine that protecting farmland via the FRPP is an efficient and productive means to protecting farmland which will aid in the effectiveness of the FRPP.

However, others argue that even with taxpayer and public support, the FRPP yearly funding may be inadequate to meet the demand of agricultural producers wishing to participate in the program. As mentioned earlier, the program is oversubscribed by six hundred percent, and modest funding to date does not come close to meeting this demand.<sup>137</sup> Inadequacies in yearly appropriations of FRPP funds may hinder the effectiveness of the program by eliminating any continuity and security of farmland protection efforts. For example, the FRPP has only been funded four out of six years since its inception in 1996.<sup>138</sup>

Additionally, many analysts believe that the United States citizenry, particularly certain specialized groups, may feel that federal policy is unfair and will work to dismantle the FRPP. For example, developers, construction workers, and those who service the construction industry will view these policy actions as both unnecessary and potentially damaging to the development process because removal of some land from the development market may increase the cost of

---

133. LIBBY & DICKS, *supra* note 8, at 5.

134. *Id.*

135. FARMLAND INFO. CENTER, *supra* note 44.

136. LIBBY & DICKS, *supra* note 8, at 4.

137. AM. FARMLAND TRUST, *supra* note 126.

138. *See* FARMLAND INFO. CTR., *supra* note 44.

remaining land, thus increasing the cost of housing.<sup>139</sup> If the effects of the FRPP work to the disadvantage of a majority of the citizenry, the public in general may feel wronged and attempt to influence a change in federal policy. Further, the public may feel that the FRPP is just a part of the overall subsidies going to farmers, and these subsidies “will cost the average American household nearly \$4,400 over the next decade.”<sup>140</sup> Consequently, the public may determine that more federal spending is an unacceptable federal policy and attempt to influence Congress to eliminate unnecessary federal spending, such as FRPP payments.

### III. DISCUSSION

#### A. *The National Loss of Farmland Does Not Currently Deserve Federal Attention*

Although statistics estimating the amount of the nation’s farmland loss indicate a problem, the magnitude of the problem is unclear. For example, the NRCS asserts that between 2002 and 2007, the United States will lose approximately four million acres of prime and unique farmland.<sup>141</sup> Based on the NRCS current figure of the nation’s total amount of prime and unique farmland (i.e., 328 million acres), the United States is projected to have approximately 324 million acres of prime and unique farmland available to produce the nation’s food and fiber in 2007.<sup>142</sup> Is the loss of approximately 1.2% of the nation’s farmland over six years a “disturbing pattern?”<sup>143</sup> Several arguments are consistently raised to support the FRPP and the federal farmland protection policy, such as the need to protect the nation’s food security, the realization that land, especially agricultural land, has value and needs protection, and the concern that the loss of farmland will negatively affect certain population groups. Each argument will be briefly discussed followed by a discussion of the merits of such arguments.

*Food Security.* The principle argument for protecting farmland is that the loss of farmland will be detrimental to our nation’s well-being by decreasing United States food production. As people move into rural areas, they take farm-

---

139. See Farm and Ranch Lands Protection Program, 67 Fed. Reg. 65,907 (proposed Oct. 29, 2002) (to be codified at 7 C.F.R. pt. 1491).

140. BRIAN M. RIEDL, THE HERITAGE FOUND., AGRICULTURE LOBBY WINS BIG IN NEW FARM BILL (Apr. 9, 2002), available at <http://www.heritage.org/research/agriculture/BG1534.cfm>.

141. NRCS, USDA, *supra* note 19, at 9.

142. *Id.* at 1.

143. Press Release, Leahy, *supra* note 128.

land out of agricultural production.<sup>144</sup> For example, “[m]ore than half of the value of [United States] farm production – including nearly 80 percent of our fruit and vegetables and more than half of our dairy products – are produced in rapidly urbanizing counties.”<sup>145</sup> As people settle further into the rural landscape, the land is thought to be permanently altered, which results in decreased availability of land for food and fiber production.<sup>146</sup>

Proponents of farmland protection also argue that as the nation loses valuable farmland to development, future options for sustaining growing populations of food and fiber needs will be limited.<sup>147</sup> Food is essential to life, and “[t]he market does not distinguish between ‘nice to have’ and ‘need to have’ in the absence of scarcity.”<sup>148</sup> According to the ERS, the current loss of farmland “poses no threat to overall United States food and fiber production.”<sup>149</sup> Because food is not presently scarce, the “consumer price of food will not produce enough rent to enable the farmer to compete with any other land-user.”<sup>150</sup> The current market conditions do not adequately signal the importance of farmland for food and fiber production, and if farmland becomes scarce, the nation’s options of producing food and fiber will be drastically limited. The commentators argue that agriculture is vital to human life, in addition to our nation’s well-being and security. The commentators suggest that any potential interference with the nation’s food and fiber production should be a legitimate national concern and responsibly protected.<sup>151</sup>

However, even considering the urbanization of agricultural lands and present economic market conditions, the United States food and fiber production is not currently threatened. According to the federal government, the nation’s food security is currently not in jeopardy,<sup>152</sup> even with the government projections that the nation will lose 1.2% of its best farmland over the next six years. This statistic fails to take into account other farmland that is capable of producing

---

144. See Goldstein, *supra* note 7.

145. James Faber, *Saving Farmland*, CONSCIOUS CHOICE, May 2001, available at <http://www.consciouschoice.com/issues/cc1405/savingfarmland1405.html>.

146. Marlow Vesterby & Kenneth S. Krupa, *Rural Residential Land Use: Tracking its Growth*, AGRIC. OUTLOOK, Aug. 2002, at 14, 17.

147. FARMLAND INFO. CTR., *supra* note 44.

148. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

149. RALPH E. HEIMLICH & WILLIAM D. ANDERSON, ERS, USDA, DEVELOPMENT AT THE URBAN FRINGE & BEYOND vi (June 2001), available at <http://www.ers.usda.gov/publications/aer803/aer803.pdf>.

150. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

151. See Taylor, *supra* note 31, at 171.

152. HEIMLICH & ANDERSON, ERS, USDA, *supra* note 149, at 15.

food and fiber. For example, twenty-two percent of land was fertile and capable of supporting agriculture in 2000, but only thirteen percent of that land was cultivated.<sup>153</sup> Even if a portion of the uncultivated land is already developed, further research is necessary because “the extent to which rural residential land is irreversible . . . has not been studied.”<sup>154</sup>

In contradiction of its public stance that farmland protection is a national issue because the nation is losing farmland at an alarming rate,<sup>155</sup> the federal government asserts that the national loss of farmland per year is dramatically decreasing.<sup>156</sup> In the NRCSs draft environmental assessment for the 2002 FRPP, it indicated that between 1992 and 2002, the nation annually lost approximately 1.3 million acres of prime and unique farmland.<sup>157</sup> In the same document, the NRCS maintains that between 2002 and 2007 the nation is expected to lose four million acres of prime and unique farmland, or 667,000 acres annually.<sup>158</sup> In other words, the NRCS predicts an approximate fifty percent decline in farmland loss annually over the next six years. Consequently, considering the vast area of open space, the current or potential agricultural lands available in the United States, and the trend toward less farmland loss, “the effects of land conversion on aggregate food and fiber production are minimal.”<sup>159</sup>

Further, American farms have and are becoming increasingly more proficient, enabling producers to produce more commodities on less or equal sized land, which diminishes the argument that farmland loss will jeopardize our nation’s food, fiber, security, and well-being. If the federal government would have engaged in similar farmland protection efforts during the early years of our country, when ninety percent of the United States population lived on farms,<sup>160</sup> arguably the United States would not have grown and developed into its current prosperous form. Even though the concerns of Congress and others during the early-to-mid 1900s were that farmland was being lost at an unacceptable rate, the nation’s agricultural producers flourished, producing more food more efficiently, despite a decrease in available farmland. As President George W. Bush recently

---

153. FARNDON, *supra* note 4.

154. *Id.*

155. NRCS, USDA, *supra* note 1, at 9.

156. *Id.*

157. *Id.* at 4.

158. *Id.* at 9.

159. Vesterby & Krupa, *supra* note 146, at 17.

160. Taylor, *supra* note 31, at 174.

stated, “our farmers and ranchers are the most efficient producers in the world . . . we’re really good at [producing agricultural products].”<sup>161</sup>

As an example of the robustness of the nation’s agricultural operators, a joint study conducted by Colorado State University, the University of Colorado, and the University of Michigan found that agricultural operators in Colorado’s Front Range (located on the eastern slope of the Rocky Mountains) have increased productivity despite a decrease in available rangeland and cropland.<sup>162</sup> The study found that from 1950 to 1997, when available agricultural land was decreasing, the harvestable acres in the Front Range increased nearly nineteen percent due primarily to the implementation of irrigation systems on the agricultural lands.<sup>163</sup>

Consequently, the small loss in total farmland combined with the increased efficiency of our nation’s producers may detract from the perceived farmland loss crisis:<sup>164</sup>

Farm productivity has been increasing . . . annually [as] . . . biotechnology and genetic engineering have provided mechanisms to (1) increase production yields, (2) lower costs in labor and agricultural inputs, (3) maintain or increase food quality, and (4) reduce pollutants through benign methods of weed and pesticide control[.] . . . [and] agriculture has become industrialized and thus economic efficiency has contributed to increased productivity.<sup>165</sup>

As with any other industry, the agricultural industry should be able to adapt to current developmental and other pressures and maintain an acceptable level of food and fiber production. One commentator argues that agriculture can adapt “by changing the products and services offered.”<sup>166</sup> For example, farms located in metropolitan areas are prominent, amounting to thirty-three percent of all farms, holding eighteen percent of all farmland, and producing a third of the

---

161. CHRIS EDWARDS & TAD DEHAVEN, CATO INST., SAVE THE FARMS – END THE SUBSIDIES (Mar. 6, 2002), at <http://www.cato.org/dailys/03-06-02.html>.

162. See William J. Parton et al., Sustainability and Historical Land Use Change in the Great Plains: The Case of Eastern Colorado 8-15 (2003) (on file with Journal).

163. See *id.*

164. Robert A. Coulthard, *The Changing Landscape of America’s Farmland: A Comparative Look at Policies Which Help Determine the Portrait of our Land – Are There Lessons We Can Learn From the EU?*, 6 DRAKE J. AGRIC. L. 261, 269-70 (2001); see also Taylor, *supra* note 31, at 175 (“[T]he productive base built up in the United States since the 1930’s ensures that Americans can count on a stable, relatively low cost supply of food.”).

165. Coulthard, *supra* note 164, at 269.

166. HEIMLICH & ANDERSON, ERS, USDA, *supra* note 149, at vi.

United States' agricultural output.<sup>167</sup> The metropolitan farms have “changed their operations to emphasize higher value products, more intensive production, and urban marketing savvy” to adjust to a higher demand for land and remain productive.<sup>168</sup>

Agricultural operators can also adapt to a growing demand for agricultural land by expanding operational income, which will help ensure that agricultural lands remain in agricultural uses. Agricultural operators can engage in off-farm employment or implement value-added activities on their land, such as bed-and-breakfasts, gourmet grocery outlets, and hunting or other recreational opportunities.<sup>169</sup> Current statistics indicate that adaptive farms in metropolitan areas “account[] for 13-14 percent of metro farms and operate 9-12 percent of metro farm acreage, but they controlled more than their proportional share of metro farm sales, assets, and net cash farm income.”<sup>170</sup> Thus, even with increased demand for land, farmers should be able to adapt to changing societal conditions and eliminate the threat of decreased food and fiber security.

In sum, even though current market conditions may not adequately address the stability of the United States food and fiber production, ample evidence suggests that our nation's food and fiber production capabilities are secure. Farmers and ranchers currently have, and will continue to have, adequate amounts of agricultural land suitable for agricultural production, will continue to become increasingly more efficient in producing food and fiber, and should be able to successfully adapt to adverse conditions to maintain a secure and stable supply of food and fiber to meet the consumer demand and to provide the nation with adequate, long-term food and fiber security. Colorado State University Professor William J. Parton maintains that “the persistence of agriculture despite larger urban populations, smaller rural populations, and declining farmland and total cropland is surprising.”<sup>171</sup> The federal government should not underestimate the resourcefulness and persistence of the United States agricultural industry.

*Land Value.* Another argument for protecting farmland is that land has value and should be protected to preserve those values. Proponents of farmland protection programs argue that agricultural land has value not only to society as a source of food and fiber production, but also because it provides access to rural

---

167. *Id.* at vi-vii.

168. *Id.* at vii.

169. *See id.* at 17-19.

170. *Id.*

171. Steve Raabe, *Study: More Irrigation Helped Farming Survive*, THE DENV. POST, Apr. 17, 2003, at C-01.

amenities, is home to a wide array of flora and fauna, supports local economic stability,<sup>172</sup> and protects the nation's historical and archeological resources.<sup>173</sup>

Advocates of farmland protection programs argue that farmland can be an important source of rural amenities, which are goods or services that the land provides directly or indirectly to people. Some of the more prominent rural amenities include access to open spaces; providing scenic beauty; offering various recreational opportunities, affording citizens with an opportunity to see farmers and ranchers and their operations; allowing citizens to know that rural agricultural land and rural amenities still exist; protecting environmentally important functions such as biodiversity and watershed protection; and retaining rural agricultural land for current or future scientific or other research opportunities.<sup>174</sup> By reducing the availability of various rural amenities through farmland loss, commentators argue that decreased open spaces will lessen an individual's quality of life.<sup>175</sup> The prevailing sentiment is that the loss of rural amenities will disrupt the "aesthetic beauty of a rural lifestyle."<sup>176</sup>

Advocates maintain that flora and fauna habitat is an excellent example of a rural amenity provided by agricultural lands. Farmland provides more than seventy percent of the habitat for America's animals,<sup>177</sup> and people like to see, interact, and harvest plants and animals for any number of reasons. Advocates argue that rural lands are vital not only because they provide a home for flora and fauna, but also because the land allows suitable space for essential flora and fauna life functions, such as food gathering and adequate reproduction opportunities.<sup>178</sup> For example, large tracts of rural lands provide the ability for "cross-breeding between population groups of the same species, which increases population health and genetic viability."<sup>179</sup> Further, even if people do not directly see or experience rural flora and fauna, some take pleasure in just knowing that sufficient habitat and opportunities exist for the preservation of wild plants and animals.

Apart from land being an input for various agricultural production processes, many commentators focus on the fact that agricultural land has other eco-

---

172. See Press Release, American Farmland Trust, Farmland Protection Receives \$30 Million Boost (Jan. 22, 2001), at <http://www.farmland.org/news/012201c.htm>.

173. Notice of Request for Proposals, 67 Fed. Reg. 37,756, 37,757 (May 30, 2002).

174. See HELLERSTEIN ET AL., USDA, *supra* note 10, at 7.

175. See STALEY, MACKINAC CTR. FOR PUB. POLICY, *supra* note 119, at 42.

176. *Id.*

177. Faber, *supra* note 145.

178. See generally HELLERSTEIN ET AL., USDA, *supra* note 10, at 9.

179. NRCS, USDA, *supra* note 19, at 7.



nomically valuable traits which justify its protection.<sup>180</sup> For example, “land is [a] location where the value one gets from [the] land depends . . . on where it is relative to other economic activities.”<sup>181</sup> This rationale demonstrates that if land is located next to a residential subdivision, then that land may be valuable to the owner of a grocery store because he can build a business and provide public services to neighboring residents. Further, agricultural land may be a secondary input for any number of other economic endeavors, including, but not limited to mining; oil and gas development and exploration; hunting, fishing or other recreational activities; pharmaceutical research; and picturesque landscapes utilized for motion picture productions. Agricultural land is also a potentially valuable source of revenue for state and federal governments in the form of mineral royalties, property taxes assessed and received,<sup>182</sup> and income taxes assessed and received.

Although not widely discussed, some commentators argue that agricultural lands have economic value because they naturally provide essential services that are costly and difficult, if not impossible, to artificially reproduce.<sup>183</sup> For example, agricultural land supports trees and other plants that produce oxygen and decrease the amount of carbon dioxide in the atmosphere. Agricultural lands provide many other natural, beneficial, and essential functions, such as supporting vegetation which helps regulate base flows and peak discharges “that directly affect water quality and indirectly reduce costs for manmade systems that artificially manage the watershed.”<sup>184</sup>

Further, commentators generally support farmland protection programs based on the fact that agricultural land supports the nation’s historical and archeological resources. Valuable historical resources include, among other things, our nation’s heritage, as “[o]ur history is deeply rooted in agriculture.”<sup>185</sup> In 1776, when the United States declared independence from Great Britain, approximately ninety percent of Americans resided on farms.<sup>186</sup> In contrast, approximately two percent of Americans reside on farms today.<sup>187</sup> The reality of losing a strong component of the nation’s heritage results in “a substantial major-

---

180. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

181. *Id.*

182. See Thomas D. Roberts, *Practitioner’s Guide to Valuation and Assessment Appeals of State and Local Assessed Property*, 32 LAND & WATER L. REV. 173, 174 (1997).

183. See NRCS, USDA, *supra* note 1, at 7-8

184. *Id.* at 8.

185. Taylor, *supra* note 31, at 174.

186. *Id.*

187. *Id.* at 175.

ity of Americans believ[ing that] it is in the country's interest to preserve small family farms."<sup>188</sup> Besides historical resources, many of the nation's archeological resources, such as evidence pertaining to Native Americans, dinosaurs or other extinct plants and animals, and evidence of past geological events, are located on agricultural land. Thus, agricultural land has value simply because it is where those and other resources are found.<sup>189</sup>

However, these arguments again fail to establish a firm need for protecting farmland through federal farmland protection programs. As mentioned earlier, agriculture should be able to persist in the face of encroaching development by utilizing existing and available national farmland and adapting to changing societal conditions. Because agriculture can arguably survive the developmental push into agricultural lands, rural amenities, sufficient land for wildlife and plant habitat, secondary economic activities, essential natural functions, and the availability of historical and archeological resources preservation should also be able to persist.

Additionally, agricultural land is extremely valuable because it can be relatively freely transferred from one person or entity to another. Land, in general, "is a commodity that may be bought, sold, or otherwise transferred within the structure of rights and obligations that define a [] market."<sup>190</sup> All different kinds of people with different sets of values may find one particular piece of land attractive for any number of reasons. As an arbitrary example, a wealthy business man in California, who toils daily setting up complex computer systems for a budding dot-com, may purchase a parcel of Nebraska farmland close to the South Platte River simply because he wants to travel there once a year to see the impressive annual migration of sandhill cranes. By eliminating agricultural land as a commodity that can be bought and sold freely for developmental purposes and by decreasing the attractiveness of buying agricultural land for the majority of the nation's citizens, the FRPP threatens a highly cherished aspect of American society – the free alienability of land.<sup>191</sup>

*Impact on Society.* Additional arguments supporting federal farmland protection policy focus around the impacts of agricultural land loss on certain segments of the nation's society. In particular, advocates argue that the adverse impacts on agricultural participants, environmental groups, urban residents, taxpayers, and developers justify federal farmland protection efforts.

---

188. *Id.*

189. *See* NRCS, USDA, *supra* note 1, at 3-4.

190. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

191. *Id.*

Commentators argue that agricultural participants are economically disadvantaged when farmland is lost because the amount of economically harvestable farmland also decreases.<sup>192</sup> Simply put, a decrease in available land, without an increase in efficiency of an agricultural operation, means a decrease in the total number of farmers who can make a living off of the land. “[F]arming and agriculture cannot continue to exist in an area unless there are adequate land resources upon which to operate.”<sup>193</sup> Further, the loss of agricultural land may place increased pressure on agricultural producers in the form of water and land-use restrictions and “farms may face deteriorating crop yields from urban smog, theft and vandalism.”<sup>194</sup>

However, as evidenced by an increased productivity in the past century, despite a decrease in agricultural lands, agricultural producers will continue to be able to modernize and become more efficient on less or equal amounts of land. Further, agricultural operators will benefit from land unburdened by developmental restrictions, or conservation easements, because their total operating capital will not diminish and may even grow if encroaching development raises land value. “Farms that cannot adjust . . . should exit the industry”<sup>195</sup> and afford new or existing agricultural operators the opportunity to successfully operate under the current market and societal conditions.

Next, advocates of farmland protection programs argue that environmental groups are negatively impacted by the loss of farmland. For purposes of this analysis, the use of *environmental group* is intended to illustrate the assumption that environmental groups are hurt when the environment is hurt, and benefited when the environment is benefited. The rationale is that environmental groups are interested in the preservation and well-being of the natural environment, which includes the impacts of agriculture on the land and surrounding areas.

Commentators argue that farmland loss negatively affects environmental groups because farmland provides wildlife habitat, watershed protection, and various other environmentally friendly functions.<sup>196</sup> Further, the government argues that when less land is available for agriculture, the remaining land is used

---

192. See Libby & Dicks, *supra* note 8, at 2.

193. Neil D. Hamilton, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 *DRAKE J. AGRIC. L.* 357, 361 (1997).

194. NRCS, USDA, *supra* note 19, at 14.

195. CHRIS EDWARDS & TAD DEHAVEN, CATO INST., *FARM REFORM REVERSAL* (Mar. 2002), available at <http://www.cato.org/pubs/tbb/tbb-0203.html>.

196. See Press Release, American Farmland Trust, *supra* note 172; see also NRCS, USDA, *supra* note 1, at 11-12.

more intensely by agricultural producers.<sup>197</sup> The government maintains that more intensive use of the land will result in adverse impacts on the environment, such as reducing water quality, causing pesticide overspray, decreasing soil health, and increasing soil erosion.<sup>198</sup>

Again, the arguments in favor of federal farmland protection programs are unpersuasive. The loss of agricultural land is likely beneficial to environmental groups because farms are near the top, if not at the top, of the nation's worst land and water polluters.<sup>199</sup> For example, the EPA found that "non-point source pollution is the main reason lakes and rivers fail to meet clean water standards . . . [a]gricultural runoff [is] by far the most extensive source of pollution responsible for impairing about sixty percent of the degraded rivers and a like percentage of degraded lakes."<sup>200</sup> The agricultural industry is a heavy water polluter because the industry "tends to use large amounts of chemical fertilizer to replace soil nutrients and [control pests]."<sup>201</sup> Further examples of agriculture as a minimally regulated and heavily polluting industry are abundant, and the protection of farmland through the FRPP will do little to combat this problem.

Advocates of federal farmland protection programs further argue that urban residents are negatively impacted by farmland loss because fewer rural amenities will be available to them.<sup>202</sup> In support, the government argues that the increased loss of farmland will result in more people living in close proximity to agricultural operations, resulting in increased conflicts with agricultural operations stemming from animal odors, dust, and noise.<sup>203</sup>

However, urban residents will likely benefit from the absence of federal farmland protection efforts. An individual family living in a crowded urban center may benefit by purchasing agricultural land to build a house and enjoy scenic

---

197. Notice of Request for Proposals, 62 Fed. Reg. 28,836 (May 28, 1997).

198. *Id.*

199. See generally J.B. Ruhl, *The Environmental Law of Farms: 30 Years of Making a Mole Hill out of a Mountain*, 31 ENVTL. L. REP. 10,203 (Feb. 2001).

200. William K. Reilly, *The Issues and the Policy: View From EPA*, 17 ENVTL. PROT. ASS'N J. 20, 21 (Nov./Dec. 1991); see, e.g., Clean Water Act, 33 U.S.C.A. § 1362(14) (West Supp. 2003) (defining a non-point source as any source of pollution other than "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged"); *id.* ("The term does not include agricultural stormwater discharges and return flows from irrigated agriculture.").

201. Taylor, *supra* note 31, at 176.

202. See Notice of Request for Proposals, 62 Fed. Reg. at 28,836.

203. See *id.*

views, less congestion, less crime, more affordable housing, better education for the children, and an overall increased standard of living.<sup>204</sup>

Even if urban dwellers choose not to relocate, they may realize a decreased amount of available open space within urban centers as a result of federal farmland protection policy.<sup>205</sup> According to the Mackinac Center for Public Policy, “[p]reventing development in rural areas outside the boundary implies increasing density within the boundary,” which has the effect of “less open space inside the boundary (where most people live) for more open space outside the boundary (where most people do not live).”<sup>206</sup> Urban residents should not be disadvantaged by both a decreased opportunity to relocate into more favorable areas and a decreased availability of open spaces within the urban areas, in order to protect two percent of the nation’s population.<sup>207</sup>

Additionally, job seekers may benefit from the absence of federal farmland protection efforts. As a segment of the urban residential population, individuals seeking jobs may initially seem to support farmland protection because the agricultural sector provides millions of jobs, both on the land and in secondary services.<sup>208</sup> However, the destruction of farmland also supplies jobs in the form of construction workers, architects, city planners, surveyors, insurance agents, and other occupations: “[I]ncreased home construction and growth in the service and trade sector have provided valuable employment for local residents.”<sup>209</sup> For example, the occupants of recently converted farmlands demand the familiar public services of schools, police and fire protection, [and] retail strip malls.<sup>210</sup> Corroborating this premise, the study of the agricultural sector in Colorado’s Front Range, an area that has experienced a decrease in available agricultural land, showed that the “steep decline in Colorado’s agricultural employment from 1950 to 1970 has since stabilized, although jobs have shifted from rural areas to service-sector jobs at agricultural-products centers along the Front

---

204. See *Making Transportation Choices: Americans Consider Alternatives*, ON COMMON GROUND, (Nat’l Ass’n of Realtors, Chi., IL) Winter 2002, at 38-40, available at <http://www.realtor.org/sg3.nsf/pages/consideralts?opendocument> (stating these are the most important considerations when deciding where to live).

205. See STALEY, MACKINAC CTR. FOR PUB. POLICY, *supra* note 119, at 43.

206. *Id.*

207. Taylor, *supra* note 31, at 175 (citing to the percentage of Americans living on farms).

208. See Faber, *supra* note 145.

209. Vias, *supra* note 21, § 4.

210. See *id.*

Range.”<sup>211</sup> Consequently, job seekers will have a fighting chance to find employment despite a loss in the amount of available agricultural lands.

Next, proponents of federal farmland protection programs argue that taxpayers are negatively impacted by farmland loss because “[f]armers and ranchers pay more in local tax revenues than it costs [the] local government to provide services to their properties,” and consequently, sprawl into rural areas may constitute a “net drain on municipal coffers.”<sup>212</sup> Commentators argue that residential land-uses are costly because municipalities often subsidize busing, road construction, water, sewer construction, and maintenance.<sup>213</sup> One commentator has even argued that residential subdivisions are more costly to taxpayers, even without the municipality paying for sewer and water services.<sup>214</sup>

However, taxpayers may benefit if the federal government does not protect farmers from development. If farmers are not protected and the inefficient, mismanaged agricultural operations exit the industry, taxpayers will benefit because they will be expending fewer resources, by way of subsidies, to farmers. With the enactment of the 2002 Farm Security and Rural Investment Act, farm subsidies are estimated to increase to \$191 billion over the next ten years.<sup>215</sup> Of course, it is the taxpayer who ends up paying the subsidies to farmers in the form of high taxes assessed and received, and taxpayers may oppose further federal spending to protect farmland that aids a small segment of the American population.<sup>216</sup>

Taxpayers may also oppose the minimal protection afforded to agricultural operators under the FRPP because the protection comes with a heavy price tag. The NRCS estimated that approximately 9.1 million acres of prime and unique farmland were lost between 1996 and 2002 (1.3 million acres annually), but only protected a total of 170,000 acres of prime and unique farmland under the FRPP.<sup>217</sup> In protecting only 1.9% of the nation’s prime and unique farmlands over seven years, the federal government spent ninety-nine million dollars of the taxpayers’ money. Taxpayers may very well decide that their money is better spent on federal efforts that obtain at least marginal results.

Whether developers will be benefited or hurt economically by the loss of farmland is unclear. Some commentators argue that developers are negatively

---

211. Raabe, *supra* note 172, at C-01.

212. FARMLAND INFO. CENTER, *supra* note 44.

213. See LONG, AM. FARMLAND TRUST, *supra* note 109.

214. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

215. RIEDL, THE HERITAGE FOUND., *supra* note 140.

216. See *id.*

217. NRCS, USDA, *supra* note 1, at 2.

impacted by farmland protection efforts, because the loss of farmland necessarily equates with increased business. As people move into rural areas, someone has to build the houses, construct the sewers, drill the wells, and perform other necessary developmental functions, all of which equate to economic success and prosperity for developers.

However, developers will not always benefit from the loss of farmland. For example, as more of the countryside is developed, developers will increasingly come into contact with endangered species and have to comply with federal law pertaining thereto.<sup>218</sup> One may posit, can endangered species really significantly impact developers? The Preble's Meadow Jumping Mouse apparently has in Colorado. The little, reclusive mouse "may be doing as much to curb Colorado's rampant development as all the slow-growth confabs and environmentalists' lawsuits put together."<sup>219</sup> Additionally, developers may feel economic pain when farmland is protected because by protecting farmland, more land is removed from the market and may "increase the cost of the remaining land, thus increasing the cost of housing."<sup>220</sup> Thus, federal farmland protection efforts will not necessarily aid nor endanger the economic prosperity of developers.

Despite the emotional persuasiveness of arguments advocating that farmland should be protected to avoid impacting certain segments of society, a more logical analysis tends to show that overall, society will benefit from decreased federal involvement in farmland protection efforts. Consequently, a credible argument exists that the nation's food security is not threatened, that farmland protection efforts do not necessarily equate with protecting the value of land, and that the impacts on various segments of society alone do not justify federal efforts to protect farmland.

B. *Without a Change in the Overall Federal Policy on Farmland Loss, the Farm and Ranch Lands Protection Program Will Not Be an Effective Long-Term Federal Policy.*

The success of the FRPP necessarily depends on numerous societal, legal, and political issues. However, three main factors will be analyzed, the resolution of which should provide a solid ground on which to determine the long-term effectiveness of the FRPP. The factors to be considered are (1) how do other federal policies interrelate with the FRPP, (2) what is the public support for

---

218. See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2000).

219. Richard Woodbury, *The Mouse that Roared*, TIME, May 4, 1998, at 4.

220. LIBBY & DICKS, *supra* note 8, at 5.

the FRPP, and (3) is the federal government the appropriate entity to protect farmland?

*Competing Governmental Policies that Undermine the FRPP.* In order for the FRPP to be successful, various other federal policies must be congruent with the FRPP so that the other policies do not undermine or downgrade the effectiveness of the FRPP. Currently, many federal policies potentially undermine the FRPP, but two major federal policies – federal environmental policy and federal transportation policy – stand out as being most lethal to the FRPPs success.

One of the most prominent concerns over the protection of farmland is the idea that farmland is harmful to the natural environment. “Agriculture harnesses the natural resources of soil, water, and seed to produce food and fiber on a massive scale . . . [and m]odern agriculture achieves this production by inserting into the environment large quantities of fertilizer and pesticides, consuming energy from largely non-renewable sources, and building dams, irrigation systems, and other physical infrastructure.”<sup>221</sup> Traditionally, farms have been exempt from the majority of environmental laws due to a variety of social and political concerns. Such policy includes not wanting to jeopardize the nation’s food security, nor wanting farmers, especially small family farmers, to go out of business.<sup>222</sup> Because federal environmental policy has dealt effectively with many environmental concerns, “the environmental impacts of farms have become increasingly apparent.”<sup>223</sup> As other industries have been cleaning up, the agricultural industry has been getting worse. Agriculture is widely regarded as one of the worst environmental polluters in the nation, does extensive damage to native plants and wildlife, and is one of the least regulated industries in the country.<sup>224</sup>

For example, the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), will be examined to illustrate the unwillingness of both the legislative and executive branches of the federal government to regulate or control agricultural water pollution.<sup>225</sup> When Congress initially enacted the CWA, it in part provided a system of regulatory control for point source pollution, or pollution that originates from a “discernible, confined

---

221. Taylor, *supra* note 31, at 171.

222. See J.B. Ruhl, *Three Questions for Agriculture About the Environment*, 17 J. LAND USE & ENVTL. L. 395, 396 (2002).

223. Holly Doremus, *Agriculture and the Environment: Introduction to the Conference Issue*, 25 ENVIRONS ENVTL. L. & POL’Y J. 47, 48 (2002).

224. Ruhl, *supra* note 222, at 400-01; *but see* Coulthard, *supra* note 164, at 266 (stating that “agriculture, subject to competing federal agency regulation, often with separate agendas, has frequently been the target of excessive oversight”).

225. Water Pollution Prevention & Control Act, 33 U.S.C. §§ 1251-1387 (2000).



and discrete conveyance,” but Congress specifically exempted “agricultural storm water discharges and return flows from irrigated agriculture,”<sup>226</sup> even though the exempted provisions meet the definition of a point source.<sup>227</sup> Further, Congress generally exempted agriculture from regulation under the non-point source pollution provisions of the CWA, which requires states to submit non-point source pollution assessment reports and implementation plans that contain planning procedures to deal with non-point source pollution.<sup>228</sup>

The EPA, the federal agency responsible for implementing the provisions of the CWA, found that “[a]gricultural runoff was by far the most extensive source of pollution, responsible for impairing about 60 percent of the degraded rivers and a like percentage of degraded lakes” around the country.<sup>229</sup> Even acknowledging that agricultural non-point source pollution is “one of the most serious remaining threats to our nation’s water quality,” EPA officials argue that “[i]t is the responsibility of farmers to grow their crops and graze their animals in ways that protect nearby streams and ground water.”<sup>230</sup> The congressional and executive dealings relating to agricultural pollution are flawed. Congress and the EPA fail to regulate agricultural pollution, recognize that agricultural pollution is one of the most serious threats to water quality, and then state that “[n]o effective solutions [for agricultural pollution] will work without the whole-hearted involvement of farmers . . . whose very livelihood depends on productive soils and healthy natural systems.”<sup>231</sup> It appears that Congress and the EPA are leaving the solution of agricultural pollution to the polluters, or in other words, letting the fox guard the henhouse.

The reason that the FRPP will likely fail, or will be less successful without federal policy that adequately addresses the environmental impacts of agriculture, is that the public sentiment may not stand for the preservation of nature at the expense of saving agriculture and agricultural lands. Society may reject the FRPP because society pays the costs of environmental damage at the hands of agriculture. “These costs are not borne directly by farmers or other participants in the food production system . . . rather they are borne . . . by taxpayers who foot

---

226. *Id.* § 1362(14).

227. *See, e.g.*, *Concerned Area Residents for the Env’t v. Southview Farms*, 34 F.3d 114, 123 (2d Cir. 1994) (holding that a large dairy farm’s pollution in western New York was classified as a point source under the CWA and subject to the CWA §402 NPDES permitting program requirements).

228. 33 U.S.C. § 1329(a)-(b).

229. Reilly, *supra* note 200, at 20, 21.

230. *Id.*

231. *Id.*

the bill for cleanup or by those whose economic activity is harmed by [the environmental damage, such as people hurt by] poor water quality.”<sup>232</sup>

In the United States, there may already be a move toward supporting more environmentally friendly farming practices, which may force politicians to change federal environmental policy relating to agriculture. One author suggests that “sustainable agriculture is more than a policy buzzword. It is an emerging practice that responds to both economic and public realities facing farmers and that, if nurtured and incentivized, could gradually transform agriculture.”<sup>233</sup> In support, a national survey indicates that about seventy-five percent of voters support higher levels of conservation spending, believing that agricultural producers should have to implement one or more conservation practices before they receive federal money.<sup>234</sup>

As one prominent commentator suggests, governmental officials are unwilling to harm the agricultural industry to improve its environmental impacts.<sup>235</sup> The commentator maintains that “this ‘no harm’ premise has been the bedrock of agriculture policy for decades regardless of which party was in control of Congress or the White House” and suggests that society should “think about the environmental law and policy of agriculture at more holistic levels.”<sup>236</sup> Unless the FRPP addresses the environmental impacts of agriculture at more holistic levels, the federal policy on protecting farmland may necessarily fail as an acceptable solution to farmland loss.

The current federal transportation policy and its impact on the FRPP should also be examined due to its potential to undermine the effectiveness of federal farmland protection policy. Among other policies, federal transportation policy has arguably deliberately and thoroughly planned for the outward mobility of people. In 1956, Congress passed the Interstate Highway Act, which provided funding for a large number of America’s roads.<sup>237</sup> Such a federal policy “encour-

---

232. Taylor, *supra* note 31, at 177.

233. *Id.*

234. CTR. FOR AGRIC. IN THE ENV’T, AM. FARMLAND TRUST, PROTECTING OUR MOST VALUABLE RESOURCES: THE RESULTS OF A NATIONAL PUBLIC OPINION POLL 8 (June 24, 2001), available at [http://aftresearch.org/farmland/docs/National\\_Public\\_Opinion.pdf](http://aftresearch.org/farmland/docs/National_Public_Opinion.pdf).

235. Ruhl, *supra* note 222, at 396.

236. *Id.*

237. See, e.g., Federal-Aid Highway Act of 1956 (Highway Revenue Act), 70 Stat. 397 (1956) (repealed by Pub. L. No. 97-424, Title V, §531(b), 96 Stat. 2191 (Jan 6, 1983)); see also Julie D. Freeman, *The 1950’s- A Social History*, Feb. 25, 2002, at <http://employees.oneonta.edu/richards/145-webpage/145-18/sld006.htm> (stating the original purpose of the Act was for military transport and a means to evacuate cities in case of nuclear attack).

age[s] people to live in the countryside and work in the city or suburb”<sup>238</sup> because the land is affordable and relatively accessible.<sup>239</sup>

Federal transportation policy is designed to accommodate individual life-style preferences and in turn affects the pattern and pace of farmland conversion.<sup>240</sup> A survey of urban and rural voters across the country indicated that forty-four percent of people would accept a commute of forty-five minutes or longer to be able to live in a larger home on a larger lot, and the same voters indicated that crime, quality of public schools, and quality of life factors were important considerations in deciding where to live.<sup>241</sup>

For example, Colorado initially utilized transportation policy to spur development and jump-start its economy<sup>242</sup> by developing an extensive infrastructure that includes more than eighty-five thousand miles of roads and eighty-three hundred bridges.<sup>243</sup> However, now Colorado is battling “out of control growth, urban sprawl, and traffic congestion,” resulting in part from its transportation policy.<sup>244</sup> Despite the problems in Colorado, the state is spending billions of dollars in addition to federal contributions to improve transportation infrastructure.<sup>245</sup> Arguably, Colorado is not “carefully consider[ing] the intended function and purpose of their roadways, and the impacts they will have.”<sup>246</sup>

Similar to federal environmental policy, federal transportation policy will also undermine the effectiveness of the FRPP if it continues to support and encourage human movement into agricultural lands. In effect, the federal government is financially and practically supporting human movement into agricultural areas while at the same time financially supporting, through FRPP payments, agricultural operators to remove development rights and fend off the encroaching sprawl. These federal policies that contradict the purposes and effects of the

---

238. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

239. LONG, AM. FARMLAND TRUST, *supra* note 109.

240. *See* LIBBY, AM. FARMLAND TRUST, *supra* note 28.

241. *See Making Transportation Choices: Americans Consider Alternatives*, *supra* note 204, at 39.

242. *See* COLO. DEP’T OF TRANSP., DEALING WITH THE EFFECTS OF COLORADO’S GROWTH, TRANSP TOPICS 1 (March 2000), *available at* <http://www.dot.state.co.us/communications/employeenews/archives/ttopmar00.pdf>.

243. *See* COLO. STATE GOV’T, MOVING FORWARD: CREATING OUR TRANSPORTATION FUTURE, SMART GROWTH [www.state.co.us/smartgrowth/moving.html](http://www.state.co.us/smartgrowth/moving.html) (last visited Apr. 4, 2004).

244. COLO. DEP’T OF TRANSP., *supra* note 242, at 1.

245. *See Making Transportation Choices: Americans Consider Alternatives*, *supra* note 204, at 51.

246. WHIT BLANTON, PLANNING COMM’R J., INTEGRATING LAND USE AND TRANSPORTATION 9, 10 (Fall 2000) (on file with author).

FRPP will undermine its success, and such policies should be reconciled to work in unison to achieve common federal goals.

*Public Support.* Public support for a governmental program is arguably vital to any successful governmental policy. A public opinion poll, initiated by the AFT, examined the public sentiment surrounding the protection of the nation's natural resources. According to the poll results, 40.2% of 1,024 respondents stated that they were "very concerned" that too much farmland was being converted to nonagricultural development and another 28.8% said that they were "somewhat concerned."<sup>247</sup> Further, 52.9% of those surveyed indicated that the government should spend more on protecting farmland that is being converted to non-agricultural uses.<sup>248</sup> However, when asked another way, 54.4% of those surveyed indicated that they would not be willing to agree to higher taxes to stop farmland from being converted.<sup>249</sup>

Thus, a conflict exists in reconciling the poll results. How can the government spend more without increasing taxes on its citizens? One possible analysis of the poll results indicates that the public is not willing to protect farmland with the use of the FRPP. Taxpayers initially fund the partial acquisition of the conservation easements through FRPP expenditures. Because landowners may receive federal income tax reductions from placing a conservation easement on their land, the "tax break . . . clearly results in a tax expenditure, and as such drains the nation's Treasury," which results in further taxes being assessed against taxpayers.<sup>250</sup>

A second possible reading of the poll results indicates that "[s]ome people support farming as an intrinsically superior way of life," and the "fact remains that people care about [agricultural] services and will argue or vote to get them through farmland protection programs."<sup>251</sup> Further, taxpayers may not be concerned with farmland loss and "will be unmotivated to question the political process and its land management policies" unless "farmland loss equates to a significant increase in food prices or supply shortage."<sup>252</sup>

Because the public poll results are ambiguous, the amount of public support for the FRPP is unclear. However, although the citizenry may feel, among other rationales, that agriculture needs to be protected because it is a superior way of life, the citizenry may not be committed to farmland protection when they

---

247. AM. FARMLAND TRUST, *supra* note 234, at 4.

248. *Id.* at 15.

249. *Id.* at 16.

250. Quinn, *supra* note 47, at 266.

251. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

252. Coulthard, *supra* note 164, at 269.

are consistently asked to pay for farmland protection in the form of higher taxes. Taxpayers may take issue with farmland protection when they are concurrently being taxed for environmental cleanup and restoration, subsidy payments to farmers, the building of roads which facilitate movement into rural areas, and for contradictory federal policy purposes.

*Appropriate Entity to Engage in Farmland Protection.* In analyzing the effectiveness of the federal policy manifested in the FRPP, it is important to determine the appropriate role of the federal government, state governments, and local governments in protecting farmland. Although “land use planning and control are essentially state and local matters by legal and cultural tradition”<sup>253</sup>, federal policy can be effective in providing money to trigger farmland protection activities.<sup>254</sup> For example, “federal assistance for local infrastructure planning and growth management affects farmland protection.”<sup>255</sup> Thus, any federal policy must consider state and local needs in effectuating federal farmland protection policy because “economic systems are porous, not isolated or self-contained.”<sup>256</sup>

According to the Rocky Mountain Land Use Institute, an effective plan for agricultural land protection must address the following issues: conservation, open space, natural resources, population forecasts, land-use considerations, transportation policies, public facilities, air quality, and infill of the cities.<sup>257</sup> States may not necessarily be as dedicated to farmland protection as they appear when first enacting farmland protection legislation. “State farmland preservation purpose statements are mere . . . rhetoric put forth to quiet farmland crisis theorists.”<sup>258</sup> States and the federal government may need to work in tandem to achieve each of these stated goals, and the FRPP may be an appropriate federal role to achieve parts of the necessary objectives of a successful plan.

The USDA-ERS suggests that a useful federal role for farmland protection would consist of “coordinating state preservation activities, encouraging states to coordinate country preservation efforts, and assisting with funding.”<sup>259</sup> The ERS rationalizes that “Americans like to travel, and many Americans move

---

253. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

254. LIBBY & DICKS, *supra* note 8, at 3.

255. LIBBY, AM. FARMLAND TRUST, *supra* note 28.

256. *Id.*

257. William C. Davidson, Remarks at the Tenth Annual Conference of the Rocky Mountain Land Use Institute (April 20, 2001) (on file with author).

258. Quinn, *supra* note 47, at 241 (internal quotations omitted).

259. ERS, USDA, FARMLAND PROTECTION PROGRAMS: WHAT DOES THE PUBLIC WANT 29, AGRICULTURAL OUTLOOK, (May 2002), available at <http://www.ers.usda.gov/publications/agoutlook/may2002/ao291h.pdf>.

across state lines when changing residence.”<sup>260</sup> The ERS also suggests that the “government[al] support of farmland preservation by keeping more land in agriculture than the market forces would provide” is justified because rural amenities are preserved for all Americans.<sup>261</sup> However, the ERS indirectly contradicts its own position, stating that “[g]overnmental policies that reduce credit constraints or increase farm household wealth may better address farm households’ yearly needs than do policies tied to farm production, farmland, or commodity protection.”<sup>262</sup> In support of the latter, ERS rationalizes that some “[t]axpayer groups may oppose further subsidy for farmers . . . and prefer that these actions by farmers be required as part of the responsibility of land ownership.”<sup>263</sup>

Considering the states’ apparent lack of dedication to farmland preservation and the possible negative sentiment of taxpayers to further support agricultural operators, the federal government’s appropriate role of providing funding, technical expertise, and other kinds of support may be futile. Because farmland protection traditionally is a local matter relegated to state and local governments, and states indicate that they are not willing to take an effective, active role in farmland preservation, and because the federal government recognizes that a federal policy which focuses on farmland preservation is not the most effective means of protecting agricultural operators, the FRPP will likely fail as an effective long-term federal farmland protection policy.

#### IV. CONCLUSION

The FRPP payments to agricultural operators are essentially a form of subsidies directed to agricultural operators to protect farmland from the increased movement of humans into rural areas. As a more direct form of federal involvement on farmland protection than previously seen, the FRPP functions by allocating federal monies to eligible entities, who in turn match and buy conservation easements from agricultural operators.

Commentators generally agree that such federal involvement is justified to protect the nation’s food security, the inherent values in agricultural lands, and the segments of the population who may be harmed by a loss of agricultural land. However, there is data which indicates that the nation’s food security will not be

---

260. *Id.*

261. Press Release, Senator Hillary Rodham Clinton, Clinton: New York Needs Local Match for Federal Farmland Protection Dollars (May 9, 2002), *available at* <http://clinton.senate.gov/news/2002/05/2002509B54.html>.

262. MISHRA ET AL., USDA, *supra* note 36, at 31, 33.

263. LIBBY & DICKS, *supra* note 8, at 5.

threatened as a result of farmland loss, due in part to the overall abundance of land, the declining trend in farmland loss, and the ability of agricultural operators to adapt to changing societal conditions. Further, the value of agricultural land will not be protected under the FRPP because the economic value of agricultural land will be lowered due to decreases in land value and in land alienability. Finally, although certain segments of the nation's population may benefit from farmland protection efforts, more citizens will benefit when federal farmland protection efforts are eliminated and market conditions are allowed to function free from federal interference.

Numerous interested groups are calling for an end to most federal subsidies directed at the agricultural industry, arguing that federal subsidy schemes, like the FRPP and the 2002 Farm Bill, "read[] like a soviet style five year plan . . . bring[ing] centralized planning in agriculture [and] preventing American agriculture from becoming a vibrant, creative, dynamic force needed to compete in the 21st century."<sup>264</sup> Although the FRPP utilizes government spending to preserve farmland and has permanently protected thousands of acres of endangered farmland, "increased government spending is not a solution to the problems farmers confront. Agriculture, like any business, is affected by the impact of regulatory reform, risk management tools, trade, taxes, health care costs, and much more."<sup>265</sup>

In sum, the federal policy evidenced by the FRPP needs to be carefully examined, by itself and in conjunction with other federal policies, to determine if it is the appropriate solution to a perceived crisis. Taxpayers need to understand that they are gratuitously protecting environmentally polluting agricultural operations, while at the same time the government undermines the FRPP with its conflicting federal environmental and transportation policies. Further, the government may be working against the will of state and local governments who are generally responsible for local land use planning regulation and control. The federal government and society in general needs to establish a firm stance to protect farmland before allowing the federal government to further subsidize the agricultural industry. If society establishes a need, the federal government should develop a more cohesive and sound federal program to address farmland protection and to more successfully operate in the modern political atmosphere. The agricultural industry is resilient, strong, and has shown the ability to adapt in the face of agricultural land loss. Society should not downgrade the attributes of

---

264. RIEDL, THE HERITAGE FOUND., *supra* note 140.

265. Press Release, Santorum, *supra* note 124.

the agricultural industry in an effort to promote a federal program that protects a small amount of our nation's best farmlands.