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VERMONT EXECUTIVE ORDER 52—CAN VERMONT PRACTICE WHAT IT PREACHES?

*Susan A. Kidd**

I. INTRODUCTION

Although Vermont's citizens and political leaders recognize that agriculture is vital to the state's well-being,¹ the number of active farms in the state has been rapidly declining.² As a result, the issue of farmland protection is the subject of increasing attention, and the national effort to identify effective farmland protec-

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1. Joint Resolution 43 passed by the Vermont General Assembly during the 1982 legislative session describes Vermont agriculture as "the major contributor to the economy of this State and the region, both directly and through its advantages to tourism and other industry." Journal of the House, page 91, for Thursday, January 28, 1982, Vermont General Assembly.

2. According to the U.S. Department of Commerce, the number of farms in Vermont has decreased from 26,490 in 1945 to 7273 in 1978. There was a steady decrease from 1945 until 1974. The 1978 census revealed an increase in the number of farms from 1974 to 1978. In Appendix C of the census, the Department of Commerce explains that some of this increase is due to improved census-taking measures over the 1974 census. The Department states that if improved 1978 procedures had been used in 1974, an estimated 2.6 million farms would have been added to the census at that time, bringing the total close to that of 1978. Below are the census figures for 1945-78:

	1945	1950	1954	1959	1964	1969	1974	1978
Number of farms	26,490	19,043	15,981	12,099	9247	6874	5906	7273
Average Size of farm (acres)	148	185	208	243	273	279	282	241

UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, 1978 CENSUS OF AGRICULTURE, page 1 (for the State of Vermont).

tion measures has now spread to Vermont.³ Both directly and indirectly, private and public organizations in the state have asserted an interest in farmland protection through a number of programs, including state tax incentives for farmers, "right to farm" legislation, development permit requirements, planning programs, and private land trusts.⁴

A critical farmland protection problem recognized in Vermont and other parts of the country is the impact of government actions causing or encouraging the development of prime agricul-

3. Vermont presently has several programs in each of the major categories of farmland protection measures identified in NATIONAL AGRICULTURAL LANDS STUDY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 7-14 (R. Coughlin & J. Keene eds. 1981) [hereinafter cited as NALS GUIDEBOOK]. The NALS GUIDEBOOK describes the following protection measures:

I. Incentives

A. Tax Relief

1. Differential Assessment
2. Property Tax Credits
3. Death Tax Benefits

B. Agricultural Districting

C. Right-To-Farm Legislation

II. Land Use Controls

A. Agricultural Zoning

B. Purchase of Interests in Land

C. Transferable Development Rights

D. Donation of Development Rights

E. Private Land Trusts

III. Integrated Programs

A. Metropolitan Growth Management Areas

B. State Programs (including executive orders)

4. Five Vermont statutes directly or indirectly protect farmland. Act 250, VT. STAT. ANN. tit. 24, § 6001 (1973 & Supp. 1981) (planning and permitting statute); Planning and Zoning Statute, VT. STAT. ANN. tit. 24, § 4301 (1975) (proposes "to encourage the appropriate development of all lands" by allowing municipalities and regions to plan and zone); Right to Farm Statute, VT. STAT. ANN. tit. 12, § 5751 (Supp. 1981) (offers some protection for agricultural activities conducted on farmland from nuisance suits); Use Value Appraisal of Agricultural and Forest Land Statute, VT. STAT. ANN. tit. 32, § 3751 (1981) (offers encouragement and assistance in the maintenance of productive agricultural and forest land as well as in the prevention of accelerated conversion of these lands to more intensive use, by directing tax appraisers to appraise eligible parcels of land at their value according to their use rather than their value for sale); Acquisition of Interests in Land by Public Agencies, VT. STAT. ANN. tit. 10, § 6301 (1973) (proposes to "encourage and assist the maintenance of the present uses of Vermont's agricultural, forest, and other undeveloped land" by allowing the owner to "sell, donate, devise, exchange or transfer property" to a municipality of the state or to one of several state government departments). The following private land trusts are established in Vermont: Connecticut River Watershed Council; Earth Bridge Community Land Trust; Lake Champlain Islands Trust; The Nature Conservancy, Vermont Chapter; and Ottauquechee Regional Land Trust.

tural land.⁵ It has been pointed out that the planning for public facilities is, in itself, a "system of land use control,"⁶ and that "the need for most types of public facilities—schools, sewers, etc.—is primarily dependent on and in fact derived from, the type and the intensity of land use in the area."⁷ Not so obvious is the fact that "public facilities have, in turn, a strong influence on land use in their vicinity—so much so that the location and timing of such facilities often tend to dominate and distort the official set of [land use] controls."⁸ This is clearly true when those controls concern farmland.

Among the various farmland protection measures employed by states, action through executive orders has become more and more common.⁹ On September 25, 1980, one of the more ambitious and detailed orders was signed by Vermont Governor Richard A. Snelling. This order, Executive Order 52, sets forth a state policy for "the preservation of the agricultural productivity of the land and the economic viability of agricultural units in planning for land use and economic development . . ."¹⁰ More specifically, the order directs state agencies to establish procedures to ensure that state projects "will not eliminate or significantly interfere with or jeopardize the continuation of agricultural potential on primary

5. It has been estimated that 21 million acres of land in the United States are covered by highways; reservoirs and other impoundments built by the Army Corps and the Bureau of Reclamation have consumed 10 million acres, much of which is rich bottomland, and continue to be developed at a rate of 300 thousand acres a year; airports take another 35 thousand acres of farmland annually; four million acres of rural land in the United States have been strip-mined, and 20 billion tons of coal suitable for strip-mining underlies 2.5 million acres of farmland in Illinois alone. A single coal-fired 2800 MW power plant proposed in Kansas, including cooling lake and ash disposal areas, covers 13,500 acres of agricultural land. Thompson, *Farmland Preservation*, in 1981 ZONING AND PLANNING LAW HANDBOOK, 342-43 (F. Strom ed. 1981).

6. Williams, *The Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80 (1970-71). The three systems identified by Williams are: 1) the official system including zoning, subdivision control, and official maps; 2) the tax system, under which local communities tend to promote land uses which will increase rather than decrease their tax base; and 3) the planning of public works.

7. *Id.* at 86.

8. *Id.*

9. In ten states, Delaware, Georgia, Illinois, Kentucky, Maryland, Massachusetts, North Carolina, Pennsylvania, Vermont, and Washington, executive orders related to farmland protection have been issued. The orders vary in content. All of them include a simple, brief policy statement supporting the preservation of farmland. Most of them direct state agencies to consider farmland protection when planning projects. A few of them set out detailed guidelines for state farmland protection.

10. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, Appendix XII (1981). The Order is reprinted in full in the Appendix to this article.

agricultural soils unless there is no feasible and prudent alternative."¹¹ Executive Order 52 goes beyond merely stating a policy for farmland protection; it sets out a specific program designed to decrease the loss of farmland to state government undertakings.¹²

Actually implementing this process raises a number of issues for Vermont and other states interested in farmland protection. The primary concern is whether or not Executive Order 52 establishes a process that can successfully protect farmland. This article will consider that issue by first discussing the Order's history and outlining the farmland protection program established by the Order. Implementation of this program will then be reviewed. A discussion of the Order's success in meeting its original goals will follow, and possible legal challenges to the Order will then be examined. Finally, the scope of Executive Order 52 will be examined to determine whether it adequately addresses Vermont's farmland concerns, and suggestions for the improvement of Executive Order 52 will be offered.

II. EXECUTIVE ORDER 52—HISTORY, PROCEDURE, AND IMPLEMENTATION

A. *History*

In Vermont, state projects were not immune from farmland impact review before the signing of Executive Order 52. Both the federal A-95 review process¹³ and the state's development-permitting process, as authorized by Vermont Act 250,¹⁴ required

11. *Id.*

12. It is important to note that while the general problem of farmland loss due to government actions has been recognized in Vermont, there has been no effort to compile figures for the amount of farmland lost in this manner. Some information is available on the amount of land that has been converted from agricultural use to forest use. See Lapping, *Toward a Working Rural Landscape*, in *NEW ENGLAND PROSPECTS: CRITICAL CHOICES IN A TIME OF CHANGE* 64 (C. Reidel ed. 1982). This article indicates that development may not be the central issue, and highlights the need for an extensive study in this area. In Joint Resolution 83, the Vermont General Assembly called for a report "describing the loss of farmland . . . and suggesting possible further responses for consideration by the Governor and the 1983 General Assembly."

13. Vermont's A-95 review process is part of the nationwide system of review for most projects proposed to be undertaken, funded, or licensed by the federal government. This process was initiated in the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 (Supp. I 1977). Its guidelines are set out in the Office of Management and Budget Circular A-95, 41 Fed. Reg. 2052 (1976).

14. Act 250 regulates large developments and subdivisions by a permitting process. District Commissions review the projects and then grant or deny permits based on a

review of some state projects affecting farmland. These review processes, however, are inadequate to protect farmland from unnecessary development. The A-95 review process is unsatisfactory because it is undertaken only when a state agency project is funded in part by federal assistance.¹⁵ The Act 250 process is

project's compliance with ten criteria. The Act was amended in 1973, and two criteria which relate to agricultural land protection were added. These criteria state:

(B) *Primary agricultural soils.* A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not significantly reduce the agricultural potential of the primary agricultural soils; or,

(i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and

(ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage; and

(iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining land or reduce their agricultural or forestry potential.

(C) *Forest and secondary agricultural soils.* A permit will be granted for the development or subdivision of forest or secondary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not significantly reduce the potential of those soils for commercial forestry, including but not limited to specialized forest uses such as maple production or Christmas tree production, of those or adjacent primary agricultural soils for commercial agriculture; or

(i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the forest or secondary agricultural soils to uses which will significantly reduce their forestry or agricultural potential; and

(ii) there are no non-forest or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of forestry and agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.

VT. STAT. ANN. TIT. 10, § 6086(a)(9)(B), (C) (1973 & Supp. 1981).

15. It was reported recently that the A-95 review process may be changed by the Reagan Administration. The Administration may allow the states to decide for themselves whether or not they want to carry out A-95 review. If they do, the states will decide which of their programs will be reviewed and what form the review process will take. It is also possible that the Reagan Administration will abolish the A-95 program entirely.

inadequate because it affords protection to only certain designated lands, and fails to create formal administrative guidelines.¹⁶

Aware of the inadequacies of these two processes, the State Planning Office sought a new way to protect Vermont farmland. The Planning Office attempted to establish a step-by-step planning process to guide state agencies when they consider participating in a project affecting farmlands. Executive Order 52 is the fruit of these efforts.

B. Procedure Outlined

Executive Order 52 presents a detailed approach to state agency review of the use of farmland. After generally directing state agencies to consider the need for preservation of prime agricultural soils and productive agricultural lands,¹⁷ the Order outlines two specific steps for agencies to follow. The first step is consultation with the State Planning Office for assistance in developing farmland protection policies, guidelines, and procedures.¹⁸ Second, the Order stipulates that within slightly more than three months of its signing, each agency must prepare a report which states: 1) the agency's farmland protection policy; 2) the agency actions which might affect agricultural land; and 3) the agency's guidelines and procedures for eliminating or minimizing impact on farmland.¹⁹

Concomitant with the issuance of the Order, the Governor created the Agricultural Lands Review Board, whose membership consists of the Commissioner of Agriculture as chairperson, the Director of the State Planning Office, the Secretary of Environmental Conservation, the Secretary of Transportation, and the Secretary of Development and Community Affairs.²⁰ The Order states that the Board shall, "at the request of the governor" review any proposed state agency actions that "will have a significant impact on productive agricultural lands or primary

16. These problems are identified and analyzed in depth in Kaplan, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467 (1982).

17. Definitions for the terms "prime agricultural soils" and "productive agricultural lands" are provided by the Implementation Guidelines for Executive Order 52. See VERMONT STATE PLANNING OFFICE, IMPLEMENTATION GUIDELINES: EXECUTIVE ORDER 52 (1980), which is reprinted in part in the Appendix to the article.

18. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981).

19. *Id.* The executive order is specific in describing the proposed content of these guidelines and procedures. See *id.* at 2(c)i-iii.

20. *Id.* at 3.

agricultural soils" and make a report, including a recommendation, to the Governor within fifteen days.²¹

Finally, the Governor called on local governments and other agencies at the local and regional level to assist state agencies in carrying out the Order.²² This request for assistance by the Governor was intended to encourage local governments to make a commitment to farmland protection as strong as the state's commitment as expressed in Executive Order 52.

The Order went into effect upon its signing by Governor Snelling. An ambitious plan for state agency consideration of farmland had thus been enacted and was ready to be implemented. As is true of any executive order, the key to success of Executive Order 52 was not its language, but its effective implementation.

C. Implementation

Following the issuance of the Executive Order, the State Planning Office sent to all affected agency heads a memorandum providing them with further guidance.²³ A Planning Office staff member was assigned to each agency to provide direct assistance in meeting the Order's mandates. As required by the Order, each agency submitted to the Governor a report specifying the farmland protection measures to be employed by the agency.

Examination of the reports reveals a diversity of responses, reflecting the variation in the types of projects carried out by each agency, as well as a variation in concern for farmland protection. For example, both the State Housing Authority and the Housing Finance Agency²⁴ stated that they would not approve any site for housing where there is currently productive agricultural land.²⁵ Both agencies require documentation regarding agricultural land on their site inspection forms.²⁶ The Public Service Board's policy for approval of projects involving agricultural land, on the other hand, is strikingly less stringent. The Board's report states that if

21. *Id.*

22. *Id.* at 4.

23. VERMONT STATE PLANNING OFFICE, IMPLEMENTATION GUIDELINES: EXECUTIVE ORDER 52 (1980).

24. These two state agencies are responsible for the siting of public housing facilities and the funding of grants for low income housing units. VT. STAT. ANN. tit. 24, § 4005 (1973).

25. STATE HOUSING AUTHORITY & HOUSING FINANCE AGENCY, REPORT IN RESPONSE TO EXECUTIVE ORDER 52 (December 1980) (available in State Planning Office files).

26. *Id.*

“agricultural lands must be affected to ensure the continuance of adequate public service, mitigating measures suggested by the Agricultural Lands Review Board or other parties will be *considered* by the Board, in its decision on the case.”²⁷ Similarly, the Department of Economic Development, which reviews proposed industrial park sites, will halt consideration of a site only when the farmland impact is significant, there are other adequate sites for industrial development, and no financial commitment has been made.²⁸ Thus, the degree to which Executive Order 52 will actually protect farmland will vary, depending on which state agency is considering converting the land to another use.

The review mechanism of Executive Order 52 has been in effect since January 1981. The Agricultural Lands Review Board, however, has been asked to review only one action.²⁹ This single review by the Board, along with the reports submitted by all of the involved state agencies, provide some basis for analyzing Executive Order 52. Because the actual amount of farmland acreage protected by the Order has not been determined, a comparison of farmland acreage lost before and after the Order cannot be made. The change in the state bureaucracy’s approach to protecting farmland, however, can be examined.

III. THE POTENTIAL EFFECTIVENESS OF EXECUTIVE ORDER 52

In order to evaluate the effectiveness of Executive Order 52 in reducing the impact of state agency undertakings on prime farmland, the Order can be analyzed in a number of ways. An evaluation of how effective the Order is in serving its original multiple purposes is perhaps the fairest and easiest way to determine the success of the program. According to the State Planning Office,

27. PUBLIC SERVICE BOARD, REPORT IN RESPONSE TO EXECUTIVE ORDER 52 (December 1980) (available in State Planning Office files). The Public Service Board is responsible for, among other things, approving or disapproving all energy-producing facilities, such as hydro-electric generating plants and transmission stations. VT. STAT. ANN. tit. 30, § 248 (1973).

28. DEPARTMENT OF ECONOMIC DEVELOPMENT OF THE AGENCY OF DEVELOPMENT AND COMMUNITY AFFAIRS, REPORT IN RESPONSE TO EXECUTIVE ORDER 52 (December 1980) (available in State Planning Office files).

29. This action involved the development of an industrial site by the Mitel Corporation in South Burlington, Vermont. The members of the Board agreed unanimously that the proposal before them, which involved developing only the portion of the site not considered to be prime agricultural land, would not significantly interfere with or jeopardize the continuation of agricultural use on the prime lands. Interview with Bob Wagner, Department of Agriculture of Vermont (January 29, 1982).

there were three primary purposes of Executive Order 52: 1) to articulate a state policy regarding farmland protection;³⁰ 2) to promote increased coordination between development agencies and the State Department of Agriculture; and 3) to increase state agency awareness of the farmland protection problem.³¹ The success of Executive Order 52 in meeting each of these purposes is evaluated below.

A. Articulation of State Policy

As a general statement of state policy regarding farmland protection, Executive Order 52 appears to be successful. Although the Order lacks some important details and there are specific problems with some of the language,³² Vermont's Executive Order 52 is still more successful than the orders of other states because its general policy statement is followed by concrete steps to be taken by state agencies to meet the Order's abstract goals. By providing such steps, the state policy can be implemented immediately. State agencies need not wait for additional laws, regulations, or orders spelling out the procedure to be followed.³³ In this way, the state's concern for farmland protection was effectively communicated to state agencies, as well as to local communities and developers within the state.

B. Promotion of Agency Coordination

The success of Executive Order 52 in meeting its second purpose—promoting increased coordination between development agencies and the State Department of Agriculture—is unclear and thus deserves more attention. That the Governor has only requested the Agricultural Lands Review Board to evaluate one project³⁴ indicates one of two trends: 1) agencies may be

30. It should be noted that since the signing of Executive Order 52, Joint Resolution 83, which also articulates a state policy of farmland protection, has passed the Vermont General Assembly. *See supra* notes 1 and 12.

31. Interview with Bernard D. Johnson, Assistant Director of State Planning Office of Vermont (January 29, 1982).

32. *See* Section VI of this article for a discussion of Executive Order 52's deficiencies.

33. The Order also appears to have been successful in providing incentives to agencies to measure and record information regarding the impact of their undertakings on agricultural land. As discussed earlier, most of the agency reports submitted to the Governor in responses to Executive Order 52 included a specific procedure for documenting information related to land use and loss. *See supra* text and notes at notes 24-29.

34. *See supra* text and note at note 29.

communicating with the Department of Agriculture at an earlier stage in the development process, or deciding for themselves how to avoid or minimize impacts to farmland; or 2) the Governor may simply be choosing not to call on the Board for political or other reasons. That there have been no agency disputes over farmland protection during Act 250 hearings since the promulgation of Executive Order 52 tends to indicate that the trend *is* toward increased agency concern.³⁵ An additional indication of increased coordination between development agencies and the State Department of Agriculture is the marked increase of early inquiries by agencies to the Department regarding the presence of farmland on their project sites.³⁶

Although there is some evidence of a trend toward early communication between development agencies and the Department of Agriculture, which might eliminate the need for review by the Agricultural Lands Review Board, there is also some evidence that the Governor is simply choosing not to request review by the Board for economic or political reasons. For example, the Department of Agriculture recently asked the Governor to request the Board's review of a dam construction project. The project is a controversial one because it will cause the flooding of about ninety acres of prime farmland, and would appear to be the exact situation which the Order anticipates would receive review. The request was denied,³⁷ however, indicating that the Governor had extrinsic reasons for deciding not to subject the project to Board review.

The success of Executive Order 52 as a coordination mechanism may also be evaluated by comparing agency attention to prime farmland before and after the Order. The State Department of Transportation's staff indicates that there has been an increased concern for prime farmland as reflected in their project planning over the past several years.³⁸ Because the Department of Transportation operates primarily with federal funding, however, the

35. This does not mean, however, that there have not been agency disputes over farmland loss that have taken place outside of the Act 250 process, and, therefore, are unrecorded.

36. Interview with George Dunsmore, Commissioner of the Department of Agriculture of Vermont (June 25, 1982).

37. Interview with Bob Wagner, Department of Agriculture of Vermont (January 29, 1982).

38. Interview with Arthur Aldrich, Department of Transportation of Vermont (February 26, 1982).

Department attributes its increased concern with farmland to compliance with federal directives as much as to compliance with Executive Order 52, if not more.³⁹ The Department of Economic Development has experienced increased coordination with the Department of Agriculture with regard to impact on agricultural land since an Act 250 case arose, in which an industrial park was not granted a permit due to farmland impacts. Unlike the Department of Transportation, however, the Department of Economic Development is not required to follow federal directives and it attributes increased coordination to Executive Order 52. The staff of the Department of Economic Development indicates that Executive Order 52 compels early resolution of farmland issues.⁴⁰ The Department has responded to the Order by preparing an inventory of potential industrial sites for submission to the Department of Agriculture in order to determine each site's potential impact to prime farmland.⁴¹ This coordination effort certainly allows for very early attention to farmland concerns.

Another way to assess the success of Executive Order 52 as a coordination mechanism is to evaluate the Order in terms of three criteria established by the Urban Institute.⁴² The Institute concluded from a study of coordination mechanisms between development related agencies that such mechanisms should serve three purposes: 1) improve the quality of development projects; 2) increase the fairness of the decision making process; and 3) promote efficient decision making which will minimize public and private costs.⁴³ These three criteria are helpful in evaluating the effectiveness of Executive Order 52 as a coordination mechanism.

Because the Agricultural Lands Review Board has conducted only one review, it is difficult to say if Executive Order 52 satisfies the first criterion set forth by the Urban Institute. The project which was reviewed, an industrial development by the Mitel Corporation, was in fact planned in a way to minimize effects on prime farmland, as Executive Order 52 directs.⁴⁴ It should be

39. *Id.*

40. Interview with Bob Justis, Department of Economic Development of Vermont (March 19, 1982).

41. *Id.*

42. F. BOSSELMAN, D.A. FEURER & C.L. SIEMON, *THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION 2* (1976) [hereinafter cited as *PERMIT EXPLOSION*].

43. *Id.*

44. Interview with Bob Wagner, Department of Agriculture of Vermont (January 29, 1982).

pointed out that the Mitel development, while in the proximity of prime agricultural land, is confined to an area not considered to be prime agricultural land. It is interesting to note, however, that the Board's limited review of that portion of the site presently planned for development still failed to ensure that the remainder of the site will be protected from future development.⁴⁵ The actual effectiveness of the Order, however, can only be evaluated when more projects have passed through the review process.

Regarding the Urban Institute's second purpose of a coordination mechanism, it is suggested that by encouraging the development of standards and guidelines, fairness in decision making may be facilitated.⁴⁶ Procedurally, Executive Order 52 appears to satisfy this criterion. The Order specifically requires the collection of information and the development of standards. The Order thus provides that competing interests affected by the proposed conversion of farmland will at least be considered. Whether or not agencies will actually give *adequate* consideration to prime farmland and ensure its present and future protection cannot, of course, be determined at this time. As a *coordination* mechanism, however, the Order is, in this respect, successful.

The third purpose of a coordination mechanism, as set forth by the Urban Institute, concerns the efficient use of public and private resources in decision making. Executive Order 52 adds a step in the process of state project planning that could result in delays and increased project costs. Because, however, this additional step provides for early confrontation of potential problems, it could help to avoid lengthy and costly delays that occur when such problems become apparent late in the project planning process. Therefore, it appears that the Order does achieve efficient use of public and private resources in that it will ultimately save money and time.

Thus, it appears that Executive Order 52 does generally meet the second goal of the State Planning Office in proposing Executive Order 52—promoting increased coordination between agencies. The Order requires that specific steps be taken by the appropriate agency to implement a farmland protection policy. In addition, the establishment of the Agricultural Lands Review Board at least creates the potential for review of projects affecting farmland by representatives of several state agencies. A review of the

45. *Id.*

46. PERMIT EXPLOSION, *supra* note 42, at 75.

three criteria established by the Urban Institute to evaluate coordination mechanisms—improving the quality of projects, increasing the fairness of the decision making process, and promoting efficiency—also indicates that as a coordination mechanism, the Vermont Order is successful.

C. Increasing Agency Awareness of Farmland Protection

The third purpose of Executive Order 52 as envisioned by the State Planning Office is to increase state agencies' general awareness of the farmland protection issue. One way to assess increased awareness is through an evaluation of organizational change: to what extent did the agency change structurally and otherwise to give greater attention to a new agency concern. In a study of organizational change carried out by the Brookings Institution⁴⁷ to determine whether or not federal agencies changed after the enactment of the National Environmental Policy Act (NEPA),⁴⁸ the authors fashioned four criteria to guide their observations: 1) whether the agency set new goals;⁴⁹ 2) whether the agency undertook any reorganization;⁵⁰ 3) whether there were any changes in the agency's output;⁵¹ and 4) whether there was openness in the agency's decision making process.⁵² Only one agency, the Army Corps of Engineers (the Corps), was found to have changed substantially as a result of NEPA; therefore it is upon this agency which the authors focus. The criteria used by Brookings in examining the Corps are also useful in evaluating organizational change that has resulted from the implementation of Executive Order 52.

47. D.A. MAZMANIAN & J. NIENABER, CAN ORGANIZATIONS CHANGE? (1979) [hereinafter cited as D.A. MAZMANIAN].

48. 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979); id. at 3. The authors do not discuss the possibility of organizational change due to judicial intervention. See, e.g., Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. (1980), where the author finds that courts are more frequently resorting to attempts at restructuring institutions in order to change those institutions' processes and policies.

49. D.A. MAZMANIAN, *supra* note 47, at 4. The authors argue that setting new goals is merely a first step in responding to new policies. These goals must be followed by structural, procedural, and output changes.

50. *Id.* at 4-6.

51. *Id.*

52. *Id.*

Based on observations and interviews,⁵³ as well as a detailed review of the reports submitted by each state agency in response to Executive Order 52,⁵⁴ the following generalizations can be made about the setting of new goals by agencies to consider farmland protection in response to the Order. In addition to the expression of commitment to farmland protection which appears in each agency report, agency representatives and State Planning Office staff respond affirmatively when asked whether or not farmland protection is important in their project planning.⁵⁵ Procedural changes reflecting a commitment to farmland in response to Executive Order 52 are also evident. Most of the agency reports outline procedures for considering and documenting farmland loss and protection.⁵⁶ For example, the Department of Education reported that it would change its publication on the planning of new school facilities to reflect concern for farmland.⁵⁷ Within the Agency of Environmental Conservation, the Department of Forests, Parks and Recreation added consideration of Executive Order 52 to its checklist for review of grant applications.⁵⁸ The Department of Transportation revised its "Action Plan" to reflect farmland protection considerations.⁵⁹ Resolutions committing its agencies to farmland protection were passed by the boards of the Vermont State Housing Authority and the Housing Finance Agency.⁶⁰

While the above procedural changes were apparent, no structural changes were made within the agencies in response to

53. In addition to the interviews cited above (*see supra* notes 31, 36, 37, 38, 40, and 44), the author interviewed Darby Bradley, Vermont Natural Resources Council (June 1, 1982), and conducted second interviews with Bernard Johnson, Assistant Director of the State Planning Office of Vermont, and Bob Wagner, Department of Agriculture of Vermont (June 1, 1982).

54. Reports in response to Executive Order 52 were prepared by each affected agency and are on file in the State Planning Office, Montpelier. *See supra* notes 25-28.

55. Mazmanian and Nienaber noted, however, that real change is evidenced in ways other than the formulation of new policy statements. In the case of the Corps, they found that the Corps took action which led to regulatory change, agency reorganization, and the hiring of new staff. D.A. MAZMANIAN, *supra* note 47, at 4-6, 37, 192.

56. *See supra* text and notes 25-28.

57. STATE DEPARTMENT OF EDUCATION, REPORT IN RESPONSE TO EXECUTIVE ORDER 52 (December 1980) (available in State Planning Office files).

58. AGENCY OF ENVIRONMENTAL CONSERVATION, REPORT IN RESPONSE TO EXECUTIVE ORDER 52 (December 1980) (available in State Planning Office files).

59. AGENCY OF TRANSPORTATION, REPORT IN RESPONSE TO EXECUTIVE ORDER 52 (available in State Planning Office files).

60. These resolutions are included in the State Housing Authority & Housing Finance Agency's REPORT IN RESPONSE TO EXECUTIVE ORDER 52, *supra* note 25.

Executive Order 52.⁶¹ No statutes or regulations have been changed to reflect a new concern for farmland. In fact, the "Implementation Guidelines" for Executive Order 52, prepared by the State Planning Office, discourage any such change by noting that it is not the intent of the Order to supersede the General Assembly.

With respect to the second criteria used by the Brookings Institute in its study, and unlike the Corps which undertook significant reorganization in order to meet NEPA mandates, no reorganization can be found in the state agencies to which Executive Order 52 applies.⁶² Whether or not reorganization is essential to implement Executive Order 52, however, is doubtful. Instead, it seems more important to allow the existing staff of the Vermont Department of Agriculture and the State Planning Office to effectively participate in the decision making process than it is to add new staff or programs to these agencies.⁶³ Furthermore, since the ultimate decision rests with the Governor and the Agricultural Lands Review Board, reorganization of the State Department of Agriculture and the State Planning Office would be of little value if the Governor and the Board were not receptive to the suggestions made by the agencies.

The third criterion used by the Brookings Institute in its study of agency responses to NEPA—changes in agency output—is the most difficult to measure.⁶⁴ While in the private sector higher productivity and greater profits can be measured to determine if an organization is changing, this is not true in the public sector. The Brookings study suggests using the standard of "better or new services" as a measure for government organizations, "better" being defined according to the intent of the applicable mandate.⁶⁵ This criterion can be applied to the implementation of Executive Order 52 by asking whether or not the state is undertaking "better" projects in light of the Order. Are state projects which do not impact upon prime farmland or which satisfactorily mitigate unavoidable impacts to farmland being carried out? Un-

61. D.A. MAZMANIAN, *supra* note 47, at 37, *passim*.

62. Whether a Department of Agriculture or State Planning office employee will be the coordinator for Executive Order 52 will be cause for debate within state government. While the Governor presently has the responsibility for convening the Agriculture Land Review Board, the Department of Agriculture provides the technical assistance in identifying prime agricultural land.

63. D.A. MAZMANIAN, *supra* note 47, at 37.

64. *Id.* at 5.

65. *Id.*

fortunately, there is now no record of how much farmland had been lost to state projects before Executive Order 52, nor is there any record of the amount of farmland relinquished since the Order.⁶⁶ It is difficult, therefore, to measure by this criterion the degree to which Executive Order 52 has increased agency awareness of farmland loss.

The fourth criterion, which is given great weight by the Brookings Institute, is the promotion of open decision making.⁶⁷ Unlike the Corps, which experienced increased public participation in decision making in response to NEPA,⁶⁸ in Vermont, there has been no effort to increase public participation in response to Executive Order 52.⁶⁹ In fact, Executive Order 52 itself outlines a decision making process which does not provide for public participation. Therefore, it appears that Executive Order 52 is not successful in promoting increased agency awareness by providing for open decision making.

In general, while Vermont has seen to the job of setting new goals and, thereby increasing awareness of farmland protection, the agencies involved with Executive Order 52 certainly have not changed significantly when compared with the changes that the Corps underwent in response to NEPA. Without any revision of statutes, rules, or regulations; without any reorganization of old staff or hiring of new staff; and without any effort to increase public participation, Executive Order 52 generally does not seem to effectively promote agency awareness according to the test established by the Brookings Institute study.

D. The Effectiveness of Executive Order 52: Conclusion

The Vermont Order may not be the most effective way of ensuring that the state agencies give adequate attention to the farm-

66. See *supra* note 12.

67. D.A. MAZMANIAN, *supra* note 47, at 5, *passim*.

68. See generally D.A. MAZMANIAN, *supra* note 47, at 61-179, 188-91.

69. Interview with Bob Wagner, Department of Agriculture of Vermont (January 29, 1982). Executive orders in general are often criticized because they are not subject to public review. See Asselin, *Executive Orders: Discretion vs. Accountability*, 51 CONN. B.J. 383 (1977); Favoriti, *Executive Orders—Has Illinois a Strong Governor Concept?*, 7 LOY. U. CHI. L.J. 295 (1976); Comment, *Executive Orders of the Wisconsin Governor*, 1980 WIS. L. REV. 333; Blumstein, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order 11, 246*, 33 VAND. L. REV. 921 (1980). Unlike agency regulations, Vermont executive orders are not made available for public review. Interview with Bernard D. Johnson, Assistant Director of State Planning Office of Vermont (January 29, 1982).

land issue. Nor does it necessarily provide for the maximum coordination between Vermont agencies in considering projects which may affect farmland. Nonetheless, the State Planning Office is satisfied that the Order has met the purposes for which it was designed.⁷⁰ Others might be more skeptical, especially since the figures on the loss of farmland acres before and after the Order are not available.⁷¹ It does seem certain that the Order has increased communication between development agencies and the Department of Agriculture;⁷² however, Department of Agriculture staff indicate that this communication could still improve greatly.⁷³ Perhaps the Order is most effective in simply declaring a strong state policy in favor of farmland protection.

The potential effectiveness of Executive Order 52, and other orders like it, must also be measured in terms of its ability to withstand legal challenge. The Vermont Order could be challenged on several grounds, should its implementation run afoul of the interests of a party likely to benefit from a particular project. The following section is an analysis of the issues surrounding the legality of Executive Order 52.

IV. THE LEGALITY OF EXECUTIVE ORDER 52

There are a number of potential problems with the issuance and use of executive orders which can raise legal questions.⁷⁴ Two commonly recurring legal questions concern a governor's authority to issue executive orders, and whether an executive order is consistent with existing statutes.⁷⁵ It is important to look at these two issues as they relate to Executive Order 52.

A. Scope of Authority

Executive orders are an unusual component of the legal system. A survey of several states' statutes reveals that the term executive order is usually not given a general definition, nor are the procedures for issuing and implementing orders outlined.⁷⁶

70. Interview with Bernard D. Johnson, Assistant Director of State Planning Office of Vermont (January 29, 1982).

71. *See supra* note 12.

72. *See supra* text and notes at notes 57, 58, 59.

73. Interview with Bob Wagner, Department of Agriculture of Vermont (January 19, 1982).

74. *See supra* note 69.

75. *See supra* note 69.

76. This was found to be true for the states of Alabama, Arizona, Connecticut, Georgia,

Some states, including Vermont, have statutes that refer to executive orders in the context of a particular use, such as in the creation of a new agency or in the reorganization of an existing agency in the executive branch.⁷⁷ Vermont's statute which provides for the issuance of executive orders⁷⁸ states that the Governor may make changes in the organization of the executive branch as is necessary for "efficient administration."⁷⁹ The statute further provides that the mechanism to be used to institute such changes is the executive order.⁸⁰ It should be noted, however, that the statute does not specifically address orders which are not issued solely for reorganizational purposes, such as Executive Order 52.

Due to the vagueness of Vermont's statutes which address executive orders, the Vermont Attorney General has had several requests to issue opinions relating to their validity.⁸¹ Attorney General Opinion 720⁸² addresses the scope of the Governor's authority to issue executive orders. The opinion states that the Governor "has no 'prerogative powers,' but only such powers as may be granted expressly or by clear implication by the constitution or statute. Thus the enforceability of an executive order in Vermont depends, in the first instance, on the subject matter being within the scope of powers granted to the governor."⁸³

Indiana, Maine, Massachusetts, New York, and North Carolina. The only exception found among those states surveyed was Maryland, which defines the term "executive order" in MD. ANN. CODE art. 41, § 15CA (1957).

77. Among the states which provide for the use of executive orders to carry out a particular plan are California, Kentucky, Wisconsin, and Vermont.

78. VT. STAT. ANN. tit. 3, § 2002 (1973).

79. *Id.*

80. *Id.*

81. According to the Vermont Attorney General's office, as of July 1982, there were ten opinions on the subject of executive orders. *See* Op. Vt. Att'y Gen. Nos. 720 (1971), 734 (1971), 22 (1973), 26 (1973), 53 (1973), 60-76 (1976), 28-77 (1977), 38-77 (1977), 3-80 (1979), 81-61 (1981).

82. 1970-72 VT. ATT'Y GEN. BIENNIAL REP., Op. No. 720.

83. *Id.* Prior Attorney General opinion addressed the question of whether an executive order has to be reaffirmed by a re-elected or newly-elected Governor. 1972-1974 VT. ATT'Y GEN. BIENNIAL REP., Op. No. 26 [hereinafter cited as ATT'Y GEN. REP.]. The opinion that executive orders are appurtenant to the office and not to the person is expressed in *McGinness v. Hunt*, 57 Ariz. 70, 111 P.2d 65 (1941), noted in Asselin, *supra* note 69, at 385. Finding that the right to issue an executive order belongs to the office, as opposed to the person who occupies the office at a given time, the Vermont Attorney General stated that "there is no reason why its effect should terminate simply because the particular incumbent of the office who issued the order is succeeded by another." ATT'Y GEN. REP., *supra*, at 167. Despite the Attorney General's assertion that executive orders do not "terminate automatically every time the particular issuing authority leaves office," it is

When Executive Order 52 was issued, a member of the Vermont General Assembly questioned the Order's legality because it had not gone through the legislative review process outlined in Vermont's statute addressing Executive Orders. The specific section of the statute in question states that if the Governor proposes by executive order changes in the organization of the executive branch which "are not consistent with or will supersede existing organization provided for by law,"⁸⁴ then the order must be submitted to both houses of the General Assembly. In response to this challenge, the Attorney General stated, in a rather lengthy opinion,⁸⁵ that Executive Order 52 was *not* subject to the review process mandated by the statute because the Order did not supersede the existing organization provided for by law.⁸⁶ For this reason, the Order was valid without legislative approval.⁸⁷ In arriving at this conclusion, the Attorney General recognized that the Governor's authority to issue executive orders must be derived from the state constitution or a particular statute.⁸⁸ Such authority may be expressly stated or implied.⁸⁹ Although reference is made to Act 250 in the introduction of the Order, the Attorney General was of the opinion that the Order was not mandated by the statute.⁹⁰ Rather, the Attorney General located the Governor's source of power to issue the order in Vermont's Constitution.⁹¹ The opinion states that "it is well within the governor's authority to promote the purposes of any state law under his constitutional duty, as chief administrative officer of the state 'to take care that the laws be faithfully executed' and 'to expedite the execution of such measures as may be resolved by the General Assembly.'" ⁹² Thus, the opinion concludes that the source of authority for Executive Order 52 is provided for generally in the Vermont Constitution.⁹³

important to note that the opinion does not prohibit a new Governor from changing any existing orders to fit his or her new policies. In his biennial report, the Attorney General states that executive orders "will continue in full force and effect until revoked, rescinded, or superseded by action of the issuing governor or a succeeding governor." *Id.* at 167.

84. VT. STAT. ANN. tit. 3, § 2002 (1973).

85. Op. Vt. Att'y Gen. No. 81-61 (1981).

86. *Id.*

87. *Id.*

88. *Id.* at 4.

89. *Id.* at 4.

90. *Id.* at 7.

91. *Id.*

92. *Id.*

93. *Id.*

To date, Vermont's courts have been silent on the subject of the Governor's authority to issue executive orders. Two commentators, however, have found that other jurisdictions which have addressed this issue usually support one of two executive power concepts: that of the weak governor or that of the strong governor.⁹⁴ In jurisdictions supporting the weak governor concept, the governor is seen as having "no inherent or prerogative powers; he is at all times subject to the state constitution and laws, in which he must find authority for his official acts."⁹⁵ In these states, courts "apply a more exacting standard when determining what discretion and authority may be implied from a constitutional provision giving the governor general power to enforce laws."⁹⁶ In the strong governor states, the governor is considered to have *broad* discretionary powers found *generally* in the constitutional phrases which require the governor to see that the laws of the state are faithfully executed.⁹⁷

In his opinion regarding Executive Order 52,⁹⁸ the Vermont Attorney General found this weak governor/strong governor dichotomy to be "imprecise at best."⁹⁹ As the opinion proceeds, the Attorney General appears to repudiate a previous Attorney General's opinion which more clearly supported the dichotomy.¹⁰⁰ In the earlier opinion, the Attorney General stated that the Governor has "no prerogative powers, that is to say his powers and authority are circumscribed by express constitutional and statutory provisions."¹⁰¹ Now, in light of Executive Order 52, the present Attorney General is faced with defending an order which is based on the Governor's general "constitutional duty" to see that the state's laws are executed,¹⁰² as opposed to an express provision, as required by the earlier opinion.¹⁰³ Rather than admit to the weak governor concept espoused in the previous opinion and find that Governor Snelling did not have the authority to issue Executive Order 52, the Attorney General supports the strong

94. See Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 54 IOWA L. REV. 78, 86-92 (1964); Asselin, *supra* note 63, *passim*.

95. Asselin, *supra* note 69, at 386.

96. *Id.* at 387.

97. *Id.*

98. Op. Vt. Att'y Gen. No. 81-61 (1981).

99. *Id.* at 5.

100. See *supra* text and notes at notes 81-83.

101. ATT'Y GEN. REP., *supra* note 83, at 167.

102. Op. Vt. Att'y Gen. No. 81-61 (1981).

103. See *supra* text and notes at notes 82, 83.

governor concept, and bases the Governor's authority in very broad constitutional powers.¹⁰⁴

Vermont's Executive Order 52 could be challenged in court by a plaintiff who claims that all executive orders must be based on specific statutory or constitutional directives. An important case, often cited in court opinions which address such issues, is *Youngstown Sheet and Tube Co. v. Sawyer*.¹⁰⁵ The Presidential executive order in this landmark case directed the United States Secretary of Commerce to seize and operate most of the steel mills in the wake of a nationwide steelworkers' strike which the President feared would threaten the national defense.¹⁰⁶ The Supreme Court found that the order was not rooted in any statute or congressional enactment.¹⁰⁷ The government claimed that the President's authority should be implied from the aggregate of his powers under the United States Constitution, relying on Article II, which states that, "the executive power shall be vested in a President . . .," and that "he shall take care that the laws be faithfully executed."¹⁰⁸ The government's argument in *Youngstown* essentially advocated a "strong executive" concept. The Supreme Court did not agree. It found instead that "in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹⁰⁹ To the Court, the executive order in question resembled legislation, and Congress has exclusive legislative authority; therefore, it found the order invalid.

In a United States district court case in Vermont involving another Presidential executive order,¹¹⁰ the court found that "although an executive order is not binding upon a court as a matter of statutory construction, the President's reading of a particular statute may be helpful."¹¹¹ While the district court did not comment specifically on Presidential authority, by characterizing executive orders as reflecting "the President's reading of a *particular* statute"¹¹² it supports a view of executive authority similar to the weak governor concept. This district court opinion and the

104. Op. Vt. Att'y Gen. No. 81-61 (1981).

105. 343 U.S. 579 (1952).

106. *Id.* at 579.

107. *Id.* at 585-86.

108. *Id.* at 587.

109. *Id.*

110. *Century Arms v. Kennedy*, 323 F. Supp. 1002, 1011 (D. Vt. 1971).

111. *Id.*

112. *Id.*

Youngstown decision both take approaches different from the Vermont Attorney General's opinion in support of the legality of Executive Order 52.

Other recent state opinions have followed the *Youngstown* example by supporting the weak governor concept. For example, in *DeRose v. Bryne*,¹¹³ the New Jersey Superior Court found the Governor's executive order making the position of Commissioner of the New York Harbor Waterfront Commission a full-time one, to be invalid due to a lack of express authorization in the New Jersey Constitution or in any New Jersey statute to issue such an order.¹¹⁴ In another case, the Supreme Court of New Jersey upheld a Governor's executive order concerning the housing of state prisoners in county correctional facilities because "the Governor acted pursuant to the legislative power granted to him by the Disaster Control Act."¹¹⁵ Again, the weak governor concept is reflected in the court's requirement that there be a specific statutory mandate.¹¹⁶

In the Opinion addressing the governor's power to issue Executive Order 52, the Vermont Attorney General cites a case which supports a weak governor concept in a different way. In the 1839 Illinois case of *Field v. People ex rel. McClernard*,¹¹⁷ the court limited the Governor's powers to acts that are *necessary*.¹¹⁸ The Vermont Attorney General found that this "necessity test" burdened the Governor with the responsibility of "demonstrating the need for particular executive orders."¹¹⁹ In upholding the Governor's power to issue Executive Order 52, the Attorney General rejected the necessity test as overly burdensome, thus supporting an extremely broad grant of gubernatorial power.

One comprehensive analysis of the scope of executive authority¹²⁰ described the holding of the court in *Field* this way:

113. 135 N.J. Super. 273, 343 A.2d 136 (1975).

114. 135 N.J. Super. 273, 288, 343 A.2d 136, 144 (1975).

115. *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982).

116. For other opinions supporting the weak governor concept, see *Pagano v. Penn. State Horse Racing Comm'n*, 50 Pa. Commw. 499, 413 A.2d 44 (1980); *O'Neil v. Thompson*, 114 N.H. 155, 316 A.2d 168 (1974).

117. 3 Ill. (2 Scam.) 79 (1839).

118. Op. Vt. Att'y Gen. No. 81-61 (1981).

119. Op. Vt. Att'y Gen. No. 81-61 (1981). The Opinion cites the following cases as providing examples of states that have not followed *Field*: *Tucker v. State*, 35 N.E.2d 270 (Ind. 1941); *State ex rel. Stubbs v. Dawson*, 119 Rac. 360 (Kan. 1911); *State ex rel. Miller v. Buchanan*, 24 W. Va. 362 (1884).

120. *Favoriti*, *supra* note 69.

The Illinois Supreme Court in *Field* held that provisions resting the executive power of the state in the governor and provisions delegating to him the responsibility to take care that the laws of the state are faithfully executed were mere declarations of fundamental principles and did not confer a specific power.¹²¹

The author went on to update *Field* by citing a more recent Illinois case, *Buettell v. Walker*,¹²² which also supports the weak governor concept:

We do not agree with the defendants' contention that the order falls within the authority granted to the Governor by section 8 of article V of the constitution which states: 'The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws.' The purpose of the order appears to be to formulate a new legal requirement rather than to execute an existing one. And while the order properly emphasizes the desirability of regulating the conduct of those who seek to do business with the state, the desirability of a regulation must be distinguished from the power to promulgate it.¹²³

Despite the outcome of *Buettell*, the author recognizes that there is language in the case that signifies a movement away from the weak governor idea.¹²⁴ In the above quotation, the court distinguishes between the governor's formulation of new law and execution of existing authority.¹²⁵ Because the governor had formulated a *new* legal requirement with the order in question, the *Buettell* court found the order invalid.¹²⁶ The court's opinion, however, implies that "if the purpose of issuing an executive order is to *execute* a legal requirement and there is *no express* power to issue this order, power, nevertheless, may be implied from the *general* grant of power delegated to the governor [by the state constitution]."¹²⁷ Thus, the Illinois Supreme Court in *Buettell* appeared to move toward a strong governor concept. There has been no subsequent case law, however, to support this change. Therefore, despite indications of a trend toward the strong governor concept, the Illinois court, like other courts which have addressed

121. *Id.* at 300.

122. 59 Ill. 2d 146, 319 N.E. 2d 502 (1974).

123. 59 Ill. 2d 146, 150, 319 N.E. 2d 502, 506.

124. Favoriti, *supra* note 69, at 300.

125. *Buettell*, 59 Ill. 2d at 153, 319 N.E.2d at 506.

126. *Id.*

127. Favoriti, *supra* note 69, at 300 (emphasis added).

this issue, interpreted the scope of executive authority in a manner inconsistent with the Opinion of the Vermont Attorney General in supporting the legality of Executive Order 52.

The Vermont Attorney General may be in the minority in his interpretation of the scope of Executive Authority. In light of the great weight of authority supporting the concept of a weak governor, it appears that if the Vermont courts were confronted with the issue, they may in fact reject the strong governor concept. If so, Executive Order 52 could be successfully challenged in court due to the lack of specific authority granted to the Governor by statute or by the state Constitution.

B. Consistency with Existing Statutes

A second issue which is commonly raised when an Executive Order is challenged is whether or not the order is consistent with existing statutes or agency regulations. It is well settled that an executive order must be consistent with existing laws.¹²⁸ To date no Vermont state agency has complained that Executive Order 52 is incompatible with any of the agencies' existing mandates.¹²⁹ Because the Order includes a disclaimer that it does not supplant or supersede any existing laws,¹³⁰ agencies were able to work the Order into their project planning processes in such a way that it did not greatly change their existing procedures.¹³¹ There remains the problem, however, as to whether Executive Order 52 is consistent with existing statutes. The statute in Vermont that is most closely related to Executive Order 52 is Vermont Act 250,¹³² which limits the development of large developments and subdivisions on prime farmland. Because both the Order and the Act involve land use decisions, it is necessary to examine whether they are consistent.

128. The Commonwealth Court of Pennsylvania found in *Shapp v. Butera* that no executive order can "be contrary to any constitutional or statutory provision." 22 Pa. Commw. 229, 233, 348 A.2d 910, 914 (1975). In *Monier v. Gallen*, the Supreme Court of New Hampshire said that "however commendable the Governor's purpose in initiating this project, the executive cannot act so as to 'conflict with appropriate legislative mandates.'" 120 N.H. 333, 338, 414 A.2d 1297,1300 (1975). This case also cites Opinion of the Justices, 118 N.H. 582, 587, 392 A.2d 125 (1976), and Opinion of the Justices, 116 N.H. 406, 413, 360 A.2d 116, 122 (1976).

129. Interview with Bernard D. Johnson, *supra* note 31.

130. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981) at 1.

131. See generally the agency reports prepared in response to Executive Order 52 (State Planning Office files.) See *supra* notes 25-28, 57-60.

132. VT. STAT. ANN. tit. 10, § 6086(a)(9)(B), (C) (1973 & Supp. 1981); see *supra* note 14.

In the introduction to Executive Order 52, Act 250 is cited several times.¹³³ The language surrounding these citations, however, is not always consistent with the language of Act 250. For example, the opening statement of the Order reads as follows: "It is the policy of the State of Vermont . . . to provide for the preservation of the agricultural productivity of the land and the economic viability of agricultural units in planning for land use and economic development."¹³⁴ This statement generally reflects the policy of Act 250,¹³⁵ although the word "preservation" never appears in the Act in relation to agricultural lands. The second part of the opening statement of the Order, however, represents a departure from Act 250. This part of the statement reads: "Uses which threaten or significantly inhibit these [farmland] resources should be permitted only when the public interest is clearly benefitted thereby."¹³⁶ This requirement of public interest is not found in Act 250. Under Act 250, decisions to permit a project which may affect farmland are not based on whether or not the project will generally benefit the public interest.¹³⁷ Rather, Act 250 decisions are made based on criteria such as the applicant's ability to realize a reasonable return on the fair market value of his/her land; the availability of alternative sites, owned or controlled by the applicant, which have no agricultural soils; the use of planning to minimize the reduction of agricultural potential; and concern for effects on adjoining agricultural lands by each project.¹³⁸ The Executive Order 52 statement, unlike the criteria set out in Act 250, is quite broad and does not even imply that the specific elements of the Act 250 test should be considered; nor does the Order require the kind of cost-balancing mandated by the statute. In this respect, the Order may be said to be inconsistent with an existing statute, and may also create problems for the Agricultural Lands Review Board in deciding which standards should be applied.

The Order's second introductory clause refers to Act 250 as providing that "the construction, expansion, or provision of public facilities and services should not significantly reduce the resource

133. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981).

134. *Id.*

135. Act 250 is intended to protect a variety of natural resources, including farmland. See *supra* note 14.

136. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981).

137. See *supra* note 14.

138. *Id.*

value of adjoining agricultural or forestry land unless there is no feasible and prudent alternative, and the facility or service has been planned to minimize its effect on adjoining lands."¹³⁹ Language to this effect is not found in Act 250, nor does it capture Act 250's intent.¹⁴⁰ Act 250 only requires permits for certain development and subdivision activities.¹⁴¹ All state "construction, expansion, or provision of public facilities" activities are *not* covered by Act 250.¹⁴² Concerning impact on adjoining lands, Act 250 does not state that a project should not "significantly reduce the resource value."¹⁴³ Rather, the Act states that the development or subdivision may be permitted if it will not "significantly reduce the agricultural potential of the primary agricultural soils."¹⁴⁴ These statements can be interpreted very differently, due to Act 250's more limited project coverage and its more specific definition of permissible farmland impact. Therefore, it seems that the Order not only appears to misstate the scope of Act 250, but may also be inconsistent with the statute. One might, therefore, meet with success in challenging the Order due to its inconsistency with an existing statute.

V. VERMONT EXECUTIVE ORDER 52: THE BEGINNING OF AN OVERALL PLAN FOR FARMLAND PROTECTION

Assuming that Executive Order 52 withstands any legal challenges which arise, it will probably be somewhat effective in preserving Vermont's farmland. It articulates a clear state policy in favor of farmland preservation; it promotes increased coordination between state agencies, to some degree; and it increases, at least minimally, state agency awareness of the farmland protection problem. Nevertheless, if Vermont is to make a serious effort to retain dwindling farmland, it must view Executive Order 52 as the beginning of a comprehensive farmland preservation program. Steps must be taken to implement Executive Order 52 more effectively. Further, even a fully effective Executive Order 52 would be quite limited in effect, and other components of a broader program must be examined. Without such a comprehen-

139. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981).

140. Act 250, VT. STAT. ANN. tit. 10, § 6086(a)(9)(B), (C) (1973 & Supp. 1981).

141. *Id.* § 6081.

142. *Id.*

143. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981).

144. Act 250, VT. STAT. ANN. tit. 10, § 6086(a) (1973 & Supp. 1981).

sive plan, Vermont faces a number of problems in attempting to effectively protect farmland. After analyzing the promulgation and implementation of Executive Order 52, two of these problems become especially clear.

First, Executive Order 52 has been promulgated without the statistical basis that a comprehensive plan could provide.¹⁴⁵ Executive Order 52 directs state agencies to implement their projects in a way that minimizes farmland loss. The Order, however, is not based on statistics which indicate that an unacceptable amount of prime farmland has been lost to state agency projects, nor does the state know what types of projects pose the greatest threat to Vermont farmland.¹⁴⁶ In addition, since the promulgation of the Order, no attempt has been made to document the amount of farmland that has been saved or lost by state agency actions. Until statistics on the state's land base and its use are collected and the State Department of Agriculture, or the State Planning Office is charged with the responsibility of documenting the effectiveness of Executive Order 52, Vermont will continue to lack an adequate basis for selecting effective farmland protection measures.

Second, without going through a comprehensive planning process, Vermont has not considered other possible ways to protect farmland. This could mean that the state has not selected the best mechanisms, or the best combination of mechanisms, for its specific protection needs. By enacting right-to-farm legislation, use-value appraisal for agricultural land, Executive Order 52, and other devices¹⁴⁷ on an *ad hoc* basis, the state may not be providing for adequate farmland protection. Vermont cannot select the best overall protection plan until a wide variety of alternatives, such as those presented by the National Agricultural Lands Study,¹⁴⁸ are considered.

VI. SUGGESTIONS FOR STRENGTHENING EXECUTIVE ORDER 52 AND VERMONT'S OVERALL FARMLAND PROTECTION PROGRAM

Executive Order 52 is an important step toward Vermont's protection of its agricultural resources. There is, however, room for improvement with regard to the Order, and also with regard to

145. See *supra* note 12.

146. *Id.*

147. See *supra* note 4.

148. See *supra* note 3 and accompanying text.

Vermont's overall approach to farmland protection. Below are some specific suggestions for strengthening Vermont's commitment to solving the problem of farmland loss.

1. *Vermont should begin mapping its prime farmland and productive agricultural lands.*

Protection devices can be made more effective with the addition of a plan which identifies the state's overall need for farmland retention.¹⁴⁹ In Delaware, the executive order for farmland protection directs the state's Office of Management and Budget to identify and map farmland worthy of preservation.¹⁵⁰ Mapping of prime agricultural soils and productive agricultural lands, as defined in Executive Order 52,¹⁵¹ would be an important component of a comprehensive plan for Vermont.

2. *The State Planning Office and/or the Vermont Department of Agriculture should carry out a study to determine to what uses farmland is being converted.* For instance, if much farmland is being lost primarily to forestry,¹⁵² then the state's agricultural land protection policy should focus on that loss rather than loss to state agency development projects.

3. *These agencies should undertake a study to determine how much farmland was lost due to state agency activities before and after Executive Order 52 was signed.* This study might be carried out as part of the report requested by the Vermont General Assembly in their recent Joint Resolution,¹⁵³ or as part of a comprehensive plan.

4. *Accurate records of requests from state agencies for formal meetings of the Agricultural Lands Review Board and requests for technical assistance should be kept.* Such records would be necessary to maintain current statistics for the study recommended in #3 above.

5. *A variety of alternative mechanisms for farmland protection should be examined.* The National Agricultural Lands Study has provided a comprehensive, effective guidebook for states and localities to learn about the myriad of farmland protection pro-

149. Kaplan, *supra* note 16, at 504.

150. Del. Exec. Order 101 (April 14, 1981).

151. *See supra* note 17.

152. *See supra* note 12.

153. *Id.*

grams.¹⁵⁴ Soon, enough time will have elapsed since the publication of the guidebook for a number of these programs to have been used and evaluated. At that time, Vermont should study all of the appropriate alternatives and decide on a potentially effective combination of protection measures for the state.¹⁵⁵ The following are some specific measures that Vermont might incorporate into a protection program.

a. *A local zoning ordinance that restricts development in undeveloped areas could be encouraged.* This would provide local authorities with control over development.¹⁵⁶ There are, however, two disadvantages to this mechanism. First, the state cannot be sure that it will be able to persuade all localities with undeveloped farmland to pass such an ordinance.¹⁵⁷ Second, this type of ordinance has not always been upheld by the courts.¹⁵⁸

b. *Agricultural zoning and agricultural districting could be incorporated into a farmland protection plan.* Agricultural zoning is simply the designation of certain areas for farming only.¹⁵⁹ Like the more general zoning ordinance described above, it may be difficult to encourage localities that do not want to restrict development to adopt agricultural zoning. Where agricultural zoning is adopted, a question is raised as to whether state and local governments should be exempt from local zoning controls when they undertake land development.¹⁶⁰ Several state courts recently rejected the "traditional rules which unquestionably grant immunity" to governments as applied to land-use controls,¹⁶¹ and advocated "a more modern view which calls for a balancing of interests

154. See *supra* note 3.

155. The NALS GUIDEBOOK, see *supra* note 3, strongly stresses the effectiveness of a state farmland protection program that combines a variety of protection measures.

156. This zoning mechanism combines two of the three systems of land use control described by Williams, see *supra* note 6; the official system and the planning of public works.

157. Local ordinances rely on passage by the local government and/or local citizens, who may be less likely than the state government to restrict the development potential of farmland.

158. In *Golden v. Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1971), an ordinance of this type was upheld. But in *Robinson v. City of Boulder*, 190 Colo. 357, 547 P.2d 228 (1976), the court held the ordinance to be invalid, and ruled that the city could refuse extension of water and sewer services only for reasons directly related to the providing of utility services. See Myers, *Legal Aspects of Agricultural Districting*, 81 *AGRI. L.J.* 627, 637 (1980).

159. F. STROM, 1981 ZONING AND PLANNING LAW HANDBOOK 48.

160. *Id.* at 48.

161. *Id.* at 49, 50.

on a case-by-case basis,"¹⁶² in considering the issue of government exemption from local zoning. This trend might indicate that a court's response to agricultural zoning could be favorable,¹⁶³ and agricultural zoning would protect farmland from both public and private development.

The agricultural districting process is more complicated and involves six basic steps: 1) a landowner who complies with acreage requirements may submit an application for creation of his/her own "agricultural district"; 2) the county planning board and district advisory committee study the application and submit a report to the local government; 3) the locality holds a public hearing; 4) review of the application and a decision on the proposed district takes place at the appropriate level of government; 5) districts are reviewed periodically; and 6) landowners are free to discontinue their association at any time.¹⁶⁴ A landowner who participates in the agricultural districting process receives two benefits: first, partial property tax exemption, so long as his or her land is retained in agriculture; and second, insulation from government activities by restricting government use and condemnation of district land.¹⁶⁵ New York and Virginia are presently the only two states with agricultural districting laws.¹⁶⁶ At this time, the laws have not been in existence for a sufficient amount of time to afford meaningful evaluation. Vermont should watch for further assessment of this protection measure.

c. *Vermont should consider requiring the preparation of Agricultural Impact Statements (AISs) prior to approval of certain state development projects.*¹⁶⁷ Such statements are used in Illinois. Based on the executive order concerning farmland protection in that state, the Illinois Department of Agriculture issued guidelines for the preparation and review of state agency project proposals.¹⁶⁸ The review is carried out by the State Department of

162. *Id.*

163. Consideration on a case by case basis at least gives agricultural zoning a chance for acceptance by the courts not provided by decisions such as *Robinson*, 190 Colo. 357, 547 P.2d 228 (1976). See *supra* note 162.

164. Myers, *supra* note 158, at 627.

165. *Id.* at 627, 628.

166. N.Y. AGRIC. & MKTS. §§ 300-307 (McKinney 1972 & Supp. 1978-79); VA. CODE § 15.1-1513 (Cum. Supp. 1976).

167. The idea of an Agricultural Impact Statement is similar to that of an Environmental Impact Statement required by NEPA, 42 U.S.C. § 4321 (Supp. I 1977).

168. See Ill. Exec. Order 4 (1980), and subsequent guidelines for implementation prepared by the Illinois Department of Agriculture.

Agriculture. If the staff finds by applying specific criteria that a project will affect farmland, they prepare an AIS. This AIS is then used to provide additional information for the projects' further review. The agency involved with the proposed project and the Department of Agriculture consult and attempt to arrive at a decision as to how the project should proceed based on the AIS. The process in Illinois relies on the initiative of state agencies to contact the Department of Agriculture.¹⁶⁹ It does not, however, rely on the governor's initiation of the review process.¹⁷⁰ Vermont might adopt the same process or a hybrid of the Illinois process by requiring the appropriate agency to prepare an AIS if the Department of Agriculture's initial review reveals the need for one.

6. *Executive Order 52 could be made a statute.*¹⁷¹ If Vermont deems the mandates of Executive Order 52 to be an important part of its plan for farmland protection, then the Order should be made statutory. Executive orders are effective tools when time is of the essence and the legislative process might delay policy implementation. Since Executive Order 52 has now been in effect for a while, it may be time for the legislature to consider enacting it as a statute. Making Executive Order 52 statutory will alleviate a number of problems with its use, primarily problems which subject it to legal challenges, as described above.¹⁷² Furthermore, if the directive of the Order is mandatory, agency compliance would improve.¹⁷³

7. *If the Order is made statutory, changes must be made in the Order's content and its language must be clarified.* Below are some specific suggestions for improving the Order's content and language.

169. Ill. Exec. Order 4 (1980).

170. *Id.*

171. Executive Order 52 was introduced as a bill during the 1981 session of the Vermont General Assembly, S.B. 126, but it was never voted on by the House Agriculture Committee.

172. There is a Vermont executive order similar to Executive Order 52, Vt. Exec. Order 2 (January 14, 1975), which has never been made statutory. The order addresses state agency policies with regard to the impact of public capital investments on the environment. While it does not propose a review process like Executive Order 52 does, Executive Order 2 does direct state agencies to follow other steps in order to ensure that they will plan their projects with concern for the environment. The State Planning Office reports that the order has, to some extent, increased agency awareness of environmental concerns.

173. The effect of NEPA on the Army Corps of Engineers illustrates this point. See *supra* text and notes at notes 47-69.

a. *Public participation should be encouraged.* A formal process for public review and comment, for example, should be introduced.

b. *The overall program should be evaluated every two or three years.* This will encourage agencies to update their farmland policies. In addition, there should be a monitoring process for projects to which mitigation measures are attached.

c. *The new statute should be more carefully drafted than the Order.* As discussed in Section IV of this article, in discussing Act 250, the Order does not accurately reflect the Act's intent.¹⁷⁴

d. *Additional state activities, such as taxing and forestation, might be included in the scope of the Order.*

e. *Regulations should replace guidelines.* Under the first step in the implementation process, which requires state agencies to develop guidelines for implementing Vermont's farmland protection policy, agencies should be directed to promulgate regulations, rather than guidelines, to insure implementation, and to clarify their legal status.

f. *The scope of the Order must be clarified.* The first step in the implementation process requires agency consideration of project effects that lead directly or indirectly to the conversion of farmland.¹⁷⁵ The term "indirectly" must be defined for the Order to be effectively implemented. Where agencies are required to ensure that their actions do not significantly reduce productive agricultural lands, the term "significant reduction" should also be defined.¹⁷⁶

g. *The Agricultural Lands Review Board should be expanded.* The membership of the Board presently consists of two representatives from departments which are primarily conservation-oriented (Agriculture and Environmental Conservation) and two from departments which are development-oriented (Transportation and Community Affairs), and one representative of the Governor. An addition to the membership—such as members of the state General Assembly, economists from each of the member agencies, or other state agency representatives—would increase the diversity of concerns.

h. *The Board should not meet solely at the discretion of the Governor.* The Board presently meets only at the request of the

174. See *supra* text and notes at notes 136-47.

175. Vt. Exec. Order 52, VT. STAT. ANN. tit. 3, app. XII (1981).

176. *Id.*

Governor. The Board review process would be more effective if the Board met at the request of its chairperson, the Secretary of Agriculture, who is more aware of the concerns of agencies which request meetings. In fact, the Order would probably operate most effectively if the Department of Agriculture were made the lead agency, responsible for the implementation of the program.

i. *The Board should be given more direction.* More specific direction needs to be given to the Board as to how to handle its review. Specific criteria that guide its decisions should be set out in the Order (or in accompanying regulations if the Order is made statutory). The Board also needs direction as to what should be included in its reports.

j. *Board reports should be circulated to interested parties other than the Governor.* This would increase the scope of participation in the consideration of farmland issues.

8. *Even if Executive Order 52 remains an executive order, these suggested changes in content and clarity should be made.* As one court noted, in *Shapp v. Butera*,¹⁷⁷ in its discussion of an executive order "the vagueness of the terms used by the Governor in this Executive Order militates against a conclusion that the executive order was even intended to be legally binding and enforceable."¹⁷⁸

VII. CONCLUSION

Vermont Executive Order 52 sets forth a state policy for farmland protection. In doing so, it has encouraged state agencies and localities to think about what they are doing and what they can do differently in the future with respect to farmland. The Order came about as a result of the failure of the two existing state project review processes to adequately consider farmland. In order to address agricultural land concerns in the planning of state projects, the Order was designed to be both a coordination and a review mechanism. The procedures set out for these functions are clear and fairly comprehensive. As a coordination mechanism, the Order has been proven to be effective to some extent. As a review mechanism, Executive Order 52 has only been used once, so its effectiveness has not yet been proven.

The disadvantages of relying on an executive order as a protection mechanism become obvious when one examines the possible

177. 22 Pa. Commw. 229, 348 A.2d 910 (1975).

178. 22 Pa. Commw. 229, 233, 348 A.2d 910, 914.

ways that an order might be challenged in court. Most commonly, legal questions arise concerning the governor's source of authority for issuing the order. While there is no case law in Vermont addressing this issue, the weight of authority tends to support the weak governor concept which restricts the Governor's authority to specific statutory or constitutional grants of power. Under this view, the legality of Executive Order 52 is doubtful. The Vermont Attorney General has most recently supported Executive Order 52 based on the strong governor concept, finding that the Governor's authority to issue it is found in his broad constitutional powers.

Another legal issue that might be used to challenge the validity of Executive Order 52 is the question of whether or not the Order is consistent with existing statutes. Since Executive Order 52 and Act 250 have similar land use planning and review purposes, it is important that the Order be consistent with the Act. There are, however, some inconsistencies between the two, both in language and in substance.

There are a number of different ways to improve the implementation of Executive Order 52. A broader, more effective, overall program of farmland protection could also be developed in Vermont. Many problems might be solved if Executive Order 52 was made a statute. Some important changes, however, must first be made in its content.

For decades Vermont has displayed a strong commitment to retaining its agricultural land base. With Executive Order 52, the state set an example by expressing its concern over farmland loss which should be followed by other states, and by local governments. Vermont should now make the order more effective. It should also examine the numerous options available to translate its concern over farmland loss into an effective program of farmland conservation.

APPENDIX

STATE OF VERMONT EXECUTIVE DEPARTMENT EXECUTIVE ORDER

WHEREAS,

it is the policy of the State of Vermont, as set forth in 10 V.S.A., Chapter 151, to provide for the preservation of the agricultural productivity of the land and the economic viability of agricultural units in

planning for land use and economic development, and further, uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby; and

WHEREAS,

the policies set forth in 10 V.S.Z., Chapter 151, further provide that the construction, expansion, or provision of public facilities and services should not significantly reduce the resource value of adjoining agricultural or forestry lands unless there is no feasible and prudent alternative, and the facility or service has been planned to minimize its effect on the adjoining lands; and

WHEREAS,

the actions of state agencies and state instrumentalities may have a detrimental impact on the preservation and maintenance of productive agricultural lands unless these actions are planned to minimize or eliminate conflicts with such lands;

NOW THEREFORE

I, Richard A. Snelling, by virtue of the authority vested in me as Governor and in furtherance of the policies set forth in 10 V.S.A., Chapter 151, do hereby direct the state agencies and instrumentalities enumerated below to establish policies, guidelines, and procedures to assure that land acquisition, direct state development projects, state assisted public and private development, and development requiring state permits will not eliminate or significantly interfere with or jeopardize the continuation of agriculture on productive agricultural lands or reduce the agricultural potential on primary agricultural soils unless there is no feasible and prudent alternative and the facility or service has been planned to minimize its effect on such lands.

To these ends I direct the following steps to be taken:

1. The State Planning Office will consult with each affected agency and instrumentality and will, through consultation and written guidelines, assist them in developing policies, guidelines, and procedures to ensure that their actions will not lead, directly or indirectly, to the conversion, loss, or significant reduction of productive agricultural lands and/or primary agricultural soils. Modifications made to policies, guidelines, and procedures of state agencies and instrumentalities shall be consistent with applicable laws and regulations of federal, state, and local governments.
2. By January 1, 1981, each agency and instrumen-

- tality enumerated in this order will prepare and submit a report to the Governor for his review and approval. The report shall consist of:
- (a) A statement of agency policy relating to the preservation and maintenance of agricultural lands in the course of executing their statutory and program responsibilities;
 - (b) A listing of agency actions including land acquisition, planning, construction, permit review, and financial assistance that may directly or indirectly impact productive agricultural lands and/or primary agricultural soils;
 - (c) A statement of agency guidelines and procedures which have been instituted or altered to eliminate or minimize impacts detrimental to the continued use of productive agricultural lands or the potential use of primary agricultural soils. This will include:
 - (i) where agency actions involve land acquisition or direct development, an identification of the mechanism for initiating review and coordination procedures so that timely and comprehensive analysis of alternatives is made. Further, an identification of mitigating measures when alternative sites or locations are not feasible;
 - (ii) where agency actions involve permit review or financial assistance, an identification of the information that will be required of applicants relating to the preservation and maintenance of productive agricultural lands and primary agricultural soils;
 - (iii) an identification of any changes in statutes or agency rules and regulations that will be needed to implement some or all of the intent of this order.
3. Effective October 1, 1980 there is created an Agricultural Lands Review Board. The Board shall be made up of the Commissioner of Agriculture, who shall serve as Chairman; the Director of the State Planning Office; the Secretary of Environmental Conservation; the Secretary of Transportation; and the Secretary of Development and Community Affairs. The State Planning Office shall provide staff and administrative support to the Board.
- The Board shall, at the request of the Governor, review proposed actions of state agencies that will have a significant impact on productive agricultural lands or primary agricultural soils.

The Board shall determine if there is a feasible or prudent alternative to the proposed action and whether appropriate mitigating measures should be applied.

The Board shall have fifteen days to conduct their review and prepare a report of their findings and recommendations for submission to the Governor.

This review shall not supplant or supercede any applicable proceedings authorized by statute or regulation.

4. The affected state agencies and instrumentalities are:
 - (a) The Agency of Administration, Division of State Buildings;
 - (b) The Agency of Development and Community Affairs including the Vermont Industrial Development Authority;
 - (c) The Vermont State and Community Colleges;
 - (d) The Department of Education;
 - (e) The Public Service Board;
 - (f) The Agency of Transportation;
 - (g) The Vermont State Housing Authority;
 - (h) The Vermont Housing Finance Agency;
 - (i) The University of Vermont.

I call upon all units of local government and all organizations administering programs at the local or regional level that affect agricultural lands to assist these state agencies and instrumentalities in carrying out this order.

IN WITNESS WHEREOF, I have hereunto set my hand caused the Great Seal of the State of Vermont to be affixed this 25th day of September, A.D., 1980.

Governor

BY THE GOVERNOR

Secretary of Civil & Military Affairs

EXECUTIVE ORDER #52

VERMONT STATE PLANNING OFFICE, IMPLEMENTATION GUIDELINES:
EXECUTIVE ORDER 52 (1980).

DEFINITIONS, SUGGESTED PROCEDURES, AND SOURCES
OF INFORMATION AND ASSISTANCE FOR
EXECUTIVE ORDER #52

The State Planning Office has taken the following definitions to the Development Cabinet and to a meeting of the agency liaison personnel. The discussions have brought about several revisions. The following definitions have been written to reflect the concerns of the participants.

A. *Prime Agricultural Soils*—A Vermont definition, for Executive Order #52.

For the purposes of this Order we will use the Act 250 definition:

As developed by the Soil Conservation Service (USDA), soils in the highest and good categories qualify as Primary Agricultural Soils to meet the definition in Act 250: (Soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or are highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. Average slope does not exceed 15%).

Soil Conservation Service uses the following definitions to develop their soil list for Act 250.

Highest (consists mainly of soils in class I and qualifying classes II and III)

1. Potential for sustained agriculture, little or no limitations for a wide variety of crops adapted to Vermont's climate, or the limitations are easily overcome.
2. Adequate moisture throughout 7 of 10 years for the growing season.
3. Correct ph for crops commonly grown or correctable with lime.
4. Water moves readily through the soil or hardpans or tougher restrictive layers are absent with 20" of the surface.

Good Potential (consists of soils in classes II and III)

1. Good potential for growing crops.
2. Limitations apply to this category which will restrict the choice of crops.
 - a. excess slope and erosion hazard
 - b. excess wetness or slow permeability
 - c. flooding hazard
 - d. shallow depths to bedrock
 - e. moderately low available water capacity.

The Soil Conservation Service prepares semi-annual reports on the soils qualifying as Prime Agricultural Land in Vermont. You will be provided with a copy of the current list by your State Planning Office liaison. Copies are normally available from the State Office of the Soil Conservation Service in Burlington.

B. Productive Agricultural Lands Definition

Productive agricultural lands for the purposes of Executive Order #52, is any parcel of land involved in a current agricultural economic unit or is a parcel involved in an agricultural cooperation as defined by the IRS. This sets a maximum on future activities at seven years.

The definition of productive agricultural lands includes more than cropland, hayland, pasture, or tillage. The definition would include buildings and facilities and support activities which are essential components of the agricultural based economic activity (e.g. farmstead, outbuilding facilities, woodlot, water supply, access, rights of ways).

