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Acre by Acre: Providing Standards for Agricultural Mitigation Using Agricultural Conservation Easements

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Comment

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I. INTRODUCTION

California's farmland acreage supports an agricultural industry valued at over $40 billion.[1] This productive land supplies approximately half of the United States' fruit, nut, and vegetable crop, in addition to providing a sizable portion of the nation's animal livestock products.[2] However, agricultural land in California faces intense pressure from development.[3] Industrial and residential development is consuming farmland at an alarming rate.[4] Over the past twenty years, industrial and residential developments have replaced over half a million acres of agricultural land.[5] Farmers and ranchers, therefore, have less land available to produce the crops and animal products that people around the world consume..[6] Providing a legal method to slow farmland conversion can help maintain the agricultural economy in the state.

Beyond the impact that farmland loss has on California's agricultural economy and the nation's food supply, losing land to urban sprawl costs communities money.[7] Low-density communities can pay around $17,700 more than a compact community would pay to provide city services to a residence or business.[8] Since most farmland loss occurs at urban edges,[9] creating institutional

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1. *California Agricultural Production Statistics*, CAL. DEP'T OF FOOD & AGRIC., http://www.cdfa.ca.gov/Statistics/ (last visited Oct. 6, 2013) (on file with the *McGeorge Law Review*) [hereinafter *Production Statistics*].

2. *Id.*

3. Peter Jensen, *State's Rapid Loss of Farmland Hot Topic at Conference*, NAPA VALLEY REG., Aug. 2, 2013, http://napavalleyregister.com/news/local/state-s-rapid-loss-of-farmland-hot-topic-at-conference/ article_0249116e-fbdc-11e2-b77c-001a4bcf887a.html (on file with the *McGeorge Law Review*).

4. *Id.*

5. EDWARD THOMPSON, JR., AGRICULTURAL LAND LOSS & CONSERVATION 19 (2009), http://www.cdfa.ca.gov/agvision/docs/Agricultural_Loss_and_Conservation.pdf (on file with the *McGeorge Law Review*). This loss is only slightly less than twice the land area of the City of Los Angeles. *State & County Quickfacts: Los Angeles, California*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/ 06/0644000.html (last visited Jan. 7, 2014) (on file with the *McGeorge Law Review*) (describing the size of the city in square miles). It is estimated that this loss will double by 2050.

6. *See* CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA AGRICULTURAL STATISTICS REVIEW, 2013–2014 at 7 (2013), *available at* http://www.cdfa.ca.gov/Statistics/PDFs/ResourceDirectory_2013-2014.pdf (on file with the *McGeorge Law Review*) (stating California's agricultural exports for 2012 were valued at over $18 billion).

7. *See* AM. FARMLAND TRUST, ALTERNATIVES FOR FUTURE URBAN GROWTH IN CALIFORNIA'S CENTRAL VALLEY: THE BOTTOM LINE FOR AGRICULTURE AND TAXPAYERS, at i (1995), *available at* http://www.farmlandinfo.org/sites/default/files/FUTURE_URBAN_GROWTH_IN_CALIFORNIAS_CENTRAL_VALLEY_2ND_PRINTING_1.pdf (on file with the *McGeorge Law Review*) (indicating that urban sprawl could increase the cost of providing services to Central Valley cities by $1.2 billion per year). This is due to greater separation between residential, commercial, and industrial areas in these communities. *See* Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 378 (2010) (describing the characteristics of sprawl).

8. *The Cost of Growth: Initial Blueprint Infrastructure Cost Analysis,* REGIONAL REP. (Sacramento Area Council of Gov't), Oct. 2005, at 5, *available at* http://www.sacog.org/regrpt/pdf/2005/10-Oct/OCT_RR_2005_V6_5.pdf (on file with the *McGeorge Law Review*) (describing the projected savings that "smart growth" planning would achieve for Sacramento in reduced utilities costs). Regional governments can use Equivalent Dwelling Units (EDU) to model the costs associated with certain city plans. *Id.* An EDU represents a single-family home's average consumption of particular resources. *See* PLACER CNTY., CAL., CODE § 13.12.010 (2013)

protections to prevent excessive farmland loss in California will help maintain the state's agricultural economy in the face of urban sprawl.[10]

Of the mechanisms to conserve land, the California Environmental Quality Act (CEQA) is but one vehicle to prevent excessive agricultural land loss.[11] CEQA requires that local agencies create documents that discuss the environmental impacts of a particular action and suggest potential mitigation methods to reduce those impacts.[12] Developers can mitigate agricultural land loss by placing land under a conservation easement to protect that land from being converted to non-agricultural uses in the future.[13] Off-site mitigation like this is often used for other impacts projects subject to CEQA may have.[14] Recent case law has held that placing an agricultural conservation easement on farmland located elsewhere is an adequate mitigation measure for the loss of prime farmland under CEQA, as long as the conservation easement is economically feasible.[15] While this decision is a step in the right direction, more clarity is needed to achieve a workable balance between California's need for development and for preservation of agricultural resources. In order to better protect California's agricultural land from the pressures of excessive development, the state legislature should amend CEQA to establish a minimum ratio for the appropriate mitigation of impacts on agricultural land through the use of agricultural conservation easements.

(describing using EDUs as a method of billing for sewer services based on the average amount of sewage flow a single-family residence produces).

9. THOMPSON, *supra* note 5, at 19.

10. *See* AB 823 – CALIFORNIA FARMLAND PROTECTION ACT FACT SHEET 1 (Office of Assemb. Susan Talamantes Eggman, Mar. 4, 2013) (on file with the *McGeorge Law Review*) ("A thriving agricultural sector is critical to the long-term strength of California's economy . . . we must ensure that appropriate policies are in place to preserve valuable agricultural land.").

11. *See* Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230, 238, 241 (1st Dist. 2013) (discussing conserving agricultural land as a mitigation measure for CEQA projects); *see also* CAL. CODE REGS. tit. 14, § 15387 app. G (2014) (listing the conversion of farmland as a potentially significant effect on the environment).

12. CAL. PUB. RES. CODE § 21100 (West 2007).

13. *See Conservation Easements*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/conservation/landowners/conservation-easements (last visited Oct. 6, 2013) (on file with the *McGeorge Law Review*) ("[A] 'conservation easement' . . . is a legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values."); AB 823, 2013 Assemb., 2013–14 Reg. Sess. (Cal. 2013) (as amended on Apr. 23, 2013) (describing the state's endorsement of conservation easements as an appropriate CEQA mitigation measure). The California Farmland Protection Act, sponsored by California Assemblymember Susan Eggman in 2013, would have amended California environmental law to require project applicants to mitigate agricultural impacts by conserving at least one acre of farmland of similar or better quality for every acre of farmland lost to the project. AB 823, 2013 Assemb., 2013–2014 Reg. Sess. (Cal. 2013) (as amended on Mar. 11, 2013).

14. *See* Preserve Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 278 (4th Dist. 2012); Cal. Native Plant Soc'y v. City of Rancho Cordova, 172 Cal. App. 4th 603, 610–611 (3d Dist. 2009); Endangered Habitats League, Inc. v. Cnty. of Orange, 131 Cal. App. 4th 777, 794 (4th Dist. 2005) (all discussing using off-site mitigation to counteract impacts to biological resources, namely endangered species).

15. *Masonite Corp.*, 218 Cal. App. 4th at 238, 240–41.

Part II of this Comment begins by describing CEQA's goals of addressing and mitigating the environmental impacts of projects. Part III, then explores the status of agricultural mitigation and CEQA prior to *Masonite Corp.*[16] and what that case means for agricultural mitigation moving forward. Next, Part IV examines and compares existing mitigation ratios for other land preservation programs in order to provide a basis for an agricultural mitigation ratio. Part V discusses the farmland quality factors to consider when choosing land to conserve. Finally, Part VI concludes with the proposition that a base ratio of one acre conserved for every acre consumed should be adopted as a CEQA amendment for appropriate agricultural mitigation.

II. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT REQUIRES MITIGATING ENVIRONMENTAL IMPACTS

CEQA became law in 1970, shortly after the United States government enacted the National Environmental Policy Act (NEPA).[17] Like their federal counterparts, California legislators sought to "maintain a high-quality environment" for their citizens through agency review of projects that could significantly affect the environment.[18] CEQA, however, went further than NEPA in several ways, requiring a more substantive review process and extending the law's application to private activities.[19]

The initial CEQA process begins with a project.[20] A project can be undertaken by a public agency, a private entity that receives financial assistance from a public agency, or a private entity whose action requires an agency to issue a permit or other entitlement.[21] An activity that causes "a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," triggers the CEQA review process, and a lead agency must prepare documents.[22] After a preliminary review by the lead agency—usually a local government body like a city or county—consultants retained by the agency or the project applicant prepare one of three documents: a Negative Declaration, a Mitigated Negative Declaration, or an Environmental Impact Report (EIR).[23]

16. 218 Cal. App. 4th 230.

17. Friends of Mammoth v. Bd. of Supervisors of Mono Cnty., 8 Cal. 3d 247, 260 (1972).

18. CAL. PUB. RES. CODE § 21001 (West 2007); *Friends of Mammoth*, 8 Cal. 3d at 260.

19. *See* CAL. CODE REGS. tit. 14, § 15378(a)(1) (2014) (extending the definition of a project subject to CEQA to activities where a "person" would need a license, permit, or other entitlement, extending the reach of CEQA beyond those actions taken by public agencies); PUB. RES. § 21002 (preventing reviewing agencies from approving proposed projects when feasible ways to avoid or mitigate significant environmental impacts exist); *cf.* 42 U.S.C.A. § 4332(C)(iii) (West 2013) (requiring only that alternatives be considered under NEPA for the project to be approved).

20. *See* PUB. RES. § 21065 (defining the projects to which CEQA applies).

21. *Id.*

22. *Id.*; *see id.* § 21100 ("[L]ead agencies shall prepare . . . an environmental impact report on any project which they propose to carry out or approve . . . .").

23. CAL. CODE REGS. tit. 14, § 15002(f). A Negative Declaration is prepared when a project will not have

An EIR is created when the project "may have a significant effect on the environment" and must include a discussion of alternatives and a list of proposed mitigation measures to reduce the environmental impacts.[24] The goal of the EIR process is to provide agencies and the public with information on the environmental impacts of a project, how to reduce those impacts, and alternatives to the project.[25]

Following the EIR's preparation, it is circulated for public comment for a period of about 45 days.[26] The lead agency then reviews the EIR and public comments, approving the project if it meets EIR requirements.[27] An adequate EIR must include all feasible alternatives to the project and mitigation measures for significant environmental impacts.[28] Part A discusses how an EIR must approach mitigation. Part B describes the use of conservation easements as a mitigation measure.

A. Analysis of Mitigating Significant Environmental Impacts

Courts have called mitigation measures "the teeth of the EIR" because without a requirement to lessen the environmental impacts of particular projects in a "pragmatic [and] concrete" way, the EIR's "gloomy forecast of environmental degradation is of little or no value."[29] An EIR must describe those mitigation measures that are "feasible" for the "significant" environmental impacts the project will incur.[30] Mitigation includes minimizing the environmental impacts of a project or avoiding impacts altogether by choosing not to take certain actions.[31] A project applicant can minimize impacts by reducing the extent of the action, repairing or restoring the impacted areas, reducing impacts throughout the life of the action, or compensating for impacts by replacing or substituting resources.[32] Additionally, a project applicant must implement mitigation measures in a timely manner.[33]

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significant environmental effects, thus mitigation is not required for its approval. PUB. RES. § 21064. A Mitigated Negative Declaration is prepared when some impacts may occur, but the applicant agrees to make revisions that reduce the impacts below the level of significance before the initial study is released to the public. *Id.* § 21064.5. *See* Eureka Citizens for Responsible Gov't v. City of Eureka, 147 Cal. App. 4th 357, 369 (1st Dist. 2007) (discussing that an EIR is not invalid because an applicant's consultants prepared it).

24. PUB. RES. § 21100.

25. *Id.* § 21002.1.

26. CAL. CODE. REGS. tit. 14 § 15087–88.

27. CAL. CODE REGS. tit. 14, § 15090, 15092.

28. CAL. CODE REGS. tit. 14, § 15126.4(a), 15126.6(a); Preserve Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 280 (4th Dist. 2012).

29. Envtl. Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018, 1039 (3d Dist. 2006).

30. Mira Mar Mobile Cmty. v. City of Oceanside, 119 Cal. App. 4th 477, 495 (4th Dist. 2004).

31. CAL. CODE REGS. tit. 14, § 15370.

32. *Id.*

33. *See* Preserve Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 280–81 (4th Dist. 2012) (indicating that mitigation measures will be found inadequate when they rely on future analysis without guidelines or standards showing commitment to mitigation).

It is generally within the lead agency's discretion to decide if a mitigation measure is appropriate or feasible;[34] however, courts have the authority to review these determinations.[35] Courts will not "substitute [their] judgment for that of [an agency]," even if different conclusions could have been drawn as to the feasibility of mitigation.[36]

B. Conservation Easements as a Mitigation Measure for CEQA Compliance

Conservation easements are voluntary contractual agreements between landowners and either a nonprofit land trust or a local government with requisite authority.[37] In the contract, the landowner grants an easement interest for conservation purposes to the land trust or local government.[38] The easement contract permanently restricts land use to promote a particular conservation goal, like maintaining land for agricultural or open-space purposes.[39] These restrictions run with the land and bind any successors in ownership.[40]

Each contract is tailored to the specific circumstances of the land placed under easement and the landowner's goals for creating the easement.[41] In an agricultural conservation easement, for example, the landowner can restrict use of the land to agricultural purposes such as breeding and raising livestock and growing and harvesting crops or horticultural plants.[42] The easement can also require that such agricultural practices are conducted in a way that "[does] not threaten or degrade significant natural resources."[43] Landowners can also limit

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34. CAL. CODE REGS. tit. 14, § 15041(a).

35. *See Preserve Wild Santee*, 210 Cal. App. 4th at 280 (evaluating the adequacy of mitigation for Quino checkerspot butterfly habitat); Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230, 238, 240 (1st Dist. 2013) (reviewing the county's determination that agricultural land losses cannot be mitigated); Cal. Oak Found. v. Regents of Univ. of Cal., 188 Cal. App. 4th 227, 278–79 (1st Dist. 2010) (reviewing mitigation measures for protecting possible archaeological resources at a project site).

36. Citizens of Goleta Valley v. Bd. Of Supervisors, 52 Cal. 3d 553, 564 (1990). Both the lead agency's determination and a court's subsequent review are limited to the information present in the EIR. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 407–08 (1988). Courts review an EIR not for "correctness," but for "its sufficiency as an informative document". *Id.* at 392 (quoting County of Inyo v. City of L.A., 71 Cal. App. 3d 185, 189 (1977).

37. CAL. CIV. CODE § 815.2 (West 2007) (stating that a conservation easement may be "voluntarily created . . . by any lawful method for the transfer of interests in real property"); *id.* § 815.3 (stating that nonprofit organizations dedicated to preserving land in its "natural, scenic, historical, agricultural, forested, or open-space condition or use" can hold easements as well as state and local governments, given that the easement is conveyed voluntarily and the government is "authorized to acquire and hold title to real property").

38. *Id.* § 815.3.

39. *Id.* § 815.1.

40. *Id.*

41. *See Conservation Easements*, *supra* note 13 (describing various conservation easement scenarios).

42. Marin Agricultural Land Trust, *Sample Agricultural Conservation Easement*, FARMSREACH, at B-1, http://www.farmsreach.com/welcome/wp-content/uploads/2013/07/MALTEasementSAmple.pdf (last visited Nov. 9, 2013) (on file with the *McGeorge Law Review*).

43. *Id.*

construction on the land to only those residences and structures necessary to keep the land in production.[44]

Beyond the conservation value, landowners also benefit from volunteering their land for easement. Namely, owners keep title to the land, so they are still free to use the land—so long as that use is permitted by the easement's terms—and alienate it as they please.[45] Additionally, certain income, property and estate tax reductions exist.[46] The agricultural conservation easement reduces the taxable value of the land because it limits the possibility of developing the land.[47] These tax benefits are instrumental in keeping agricultural land in production because they lessen the financial pressure on owners to sell land to the highest bidder, usually a developer.[48] Because an agricultural conservation easement is perpetual in duration, its tax and farmland conservation benefits run with the land forever.[49]

III. AGRICULTURAL MITIGATION AND CEQA

The California legislature has indicated that the CEQA process is an important mechanism for preserving agricultural land.[50] Although CEQA has always required analysis of agricultural impacts in an EIR,[51] until recently, agencies, project applicants, and courts were unsure if mitigation was required for agricultural land losses.[52] If agricultural impacts are capable of being mitigated—and therefore required to be when economically feasible—then the question remains regarding how much substitute land should be protected for adequate mitigation.[53] CEQA habitat conservation, wetland mitigation, and city

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44. *Id.*

45. *Conservation Easements*, *supra* note 13.

46. *Id.*

47. *Id.* This is similar to the effect that entering a Williamson Act contract with a county would have on the land. *See Land Conservation (Williamson) Act Program Overview*, CAL. DEP'T OF CONSERVATION, http://www.conservation.ca.gov/dlrp/lca/basic_contract_provisions/Pages/wa_overview.aspx (last visited May 31, 2014) (on file with the *McGeorge Law Review*) (describing the basics of the Williamson Act, a state program that allows farmers and ranchers to contract with their county to keep their acreage in agricultural uses for a term of ten years in exchange for a property tax reduction. Some tax savings under this program can exceed 80%).

48. *See* Steve Adler, *Williamson Act Faces a Renewed Budgetary Threat*, AG ALERT (Jan. 26, 2011) http://www.agalert.com/story/ ?id=1668 (on file with the *McGeorge Law Review*) (discussing the benefits of agricultural land tax reductions through the Williamson Act).

49. CAL. CIV. CODE § 815.2(b) (West 2007).

50. Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230, 241 (1st Dist. 2013) (citing 1993 Cal. Stat. 4428).

51. *See* CAL. CODE REGS. tit. 14, § 15387 app. G (2007) (listing "Agriculture Resources" as an environmental factor that may be affected by a project subject to CEQA).

52. Joshua Safran, *Zero Sum Game: The Debate Over Off-Site Agricultural Mitigation Measures*, 6 VT. J. ENVTL. L. 1, 18 (2004).

53. *Compare* Citizens for Open Gov't v. City of Lodi, 205 Cal. App. 4th 296, 322 (3d Dist. 2012) (upholding a one-to-one mitigation ratio for agricultural losses) *with* S. Cnty. Citizens for Responsible Growth v. City of Elk Grove, No. C042302, 2004 WL 219789, at *4 (Cal. Ct. App. 3d Dist. 2004) (discussing Sacramento County's adoption of the East Franklin Specific Plan, which required preservation of 0.63 acres for

and county agricultural conservation programs provide useful comparisons for courts and lead agencies in determining the ability to mitigate farmland loss and the amount of land necessary for mitigation purposes.[54]

To frame the history of agricultural mitigation under CEQA, Part A will discuss the period of uncertainty surrounding the possibility of mitigating agricultural land impacts. Part B will then take an in-depth look at the first published appellate court case taking a stance on agricultural mitigation as a legal requirement. Then, Part C will discuss the feasibility of agricultural mitigation, both legal and economic.

A. CEQA's Silence on Requiring Agricultural Mitigation

CEQA does not explicitly state that applicants can or should mitigate any particular impacts, though some impacts—like those to endangered species habitat or wetland areas—have long required mitigation in practice.[55] Courts have decided few cases regarding agricultural mitigation through off-site conservation easements, and several of these are not published.[56] This prevents applicants and agencies from using these cases to clarify whether mitigation is required and which methods are acceptable to reduce impacts on agricultural land.[57] In the published cases, the courts have merely upheld an agency's feasibility determination regarding the use of agricultural easements to mitigate impacts; they have not decided whether agencies were required to consider off-site agricultural mitigation, or any mitigation at all, to comply with the CEQA process.[58]

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every acre of farmland lost to development).

54. *See Masonite Corp.*, 218 Cal. App. 4th at 238–39 (comparing off-site agricultural mitigation to off-site habitat conservation as an adequate mitigation measure); *S. Cnty. Citizens for Responsible Growth*, 2004 WL 219789 at *4 (using county and city agricultural conservation programs as a model for a project's mitigation measures).

55. *See* Envtl. Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018, 1042 (3d Dist. 2006) (holding that a Conservation Plan that substituted off-site land for species' habitat was an adequate mitigation measure under both CEQA and the California Endangered Species Act); *Procedural Guidance for the Review of Wetland Projects in California's Coastal Zone: 1. Coastal Development Permit Review Process*, CAL. COASTAL COMM'N, § III(B)(3), http://www.coastal.ca.gov/wetrev/wetch1.html (last visited Nov. 9, 2013) (on file with the *McGeorge Law Review*) [hereinafter *Development Permit Review Process*] (discussing mitigation requirements for permit-seeking projects that may be subject to CEQA review).

56. *See S. Cnty. Citizens for Responsible Growth*, 2004 WL 219789 at *1 (discussing that a city is required to mitigate agricultural land losses); Friends of the Kangaroo Rat v. Cal. Dep't of Corr., 4 Cal. Rptr. 3d 558 (Ct. App. 5th Dist. 2003) (depublished) (on file with the *McGeorge Law Review*) (holding that agricultural land losses at a particular site cannot be mitigated, thus measures to reduce effects are not required).

57. CAL. R. COURT 8.1115(a) (West 2007) (prohibiting citing or relying upon unpublished California court decisions in later cases).

58. *See* Citizens for Open Gov't v. City of Lodi, 205 Cal. App. 4th 296, 322 (3d Dist. 2012) (stating that the city's requirement to partially mitigate the impact on 40 acres of agricultural land with an easement on 40 acres elsewhere was adequately supported); Cherry Valley Pass Acres & Neighbors v. City of Beaumont, 190 Cal. App. 4th 316, 350 (4th Dist. 2010) (holding that substantial evidence supported the city's determination that using agricultural easements as mitigation was economically infeasible).

In the unpublished case *South County Citizens for Responsible Growth v. City of Elk Grove*, the court considered an EIR for a shopping center and residential project that was to be built on 295 acres of agricultural land in southern Elk Grove.[59] The court held that the agency must consider the use of off-site conservation easements for agricultural mitigation, even though it "[would] not lessen the effects to below a level of significance."[60] The court reasoned that despite the fact that off-site mitigation cannot completely eliminate the project's significant impacts to agricultural land caused by the project, CEQA still requires mitigation whenever it is feasible and lessens environmental effects.[61] This reasoning reflects language in the CEQA Guidelines, which lists "providing substitute resources or environments" in the definition of mitigation.[62]

Conversely, the court in *Friends of the Kangaroo Rat v. California Department of Corrections*, decided the same issue differently.[63] That court held that because the particular acres of farmland converted to a prison facility were lost forever, there was no way to reduce this loss through mitigation.[64] Substituting other land would not lessen the project's impacts on the acres at the prison site, according to the court.[65] *South County Citizens for Responsible Growth* and *Friends of the Kangaroo Rat* evidence a split in the reasoning of California appellate districts, although neither case set precedent due to their unpublished status.[66] These cases show the difficulty that agencies, courts, and applicants have had in deciding whether agricultural mitigation is required under CEQA and if conservation easements are an appropriate mitigation measure.[67]

B. Masonite: *Giving Agricultural Mitigation a Place in the CEQA Process*

In July 2013, the First District Court of Appeal published its decision in *Masonite Corp. v. County of Mendocino*, which required mitigating agricultural land losses by protecting other comparable farmland with a conservation easement when economically feasible.[68] This decision establishes, at least in the First District, that applicants must mitigate the loss of agricultural land and that

59. *S. Cnty. Citizens for Responsible Growth*, 2004 WL 219789 at *1.

60. *Id.* at *5.

61. *Id.*

62. CAL. CODE REGS., tit. 14, §15370(e) (2014).

63. Friends of the Kangaroo Rat v. Cal. Dep't of Corr., 4 Cal. Rptr. 3d 558, 566 (5th Dist. 2003) (depublished) (holding that agricultural conservation easements do not constitute mitigation for acreage lost under CEQA's definitions).

64. *Id.* (stating that the only way to reduce the loss of farmland is "to not build the prison," the "'no project' alternative").

65. *Id.*

66. *See Id.* (holding that agricultural conservation easements are not a mitigation measure); S. Cnty. Citizens for Responsible Growth v. City of Elk Grove, No. C042302, 2004 WL 219789, at *5 (Cal. Ct. App. 3d Dist. 2004) (holding that agricultural conservation easements can be a legally sufficient mitigation measure).

67. Safran, *supra* note 52, at 18.

68. Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230, 238, 241 (1st Dist. 2013).

agricultural conservation easements are a legally feasible method of achieving such mitigation.[69]

Masonite dealt with an EIR adopted by Mendocino County for a sand and gravel mine project.[70] The sixty-five acre project site included forty-five acres of "prime farmland," much of which had been a vineyard.[71] Masonite Corporation—the owner of a parcel neighboring the mine site—contested several aspects of the project's EIR and the County's approval process, particularly the EIR's discussion of the cumulative impacts the project would have on agriculture.[72] The project's EIR stated that the permanent loss of prime farmland was an unavoidable impact of the project's completion.[73] The EIR also determined that using off-site agricultural conservation easements would not be a legally feasible mitigation measure because these easements would only address the project's indirect and cumulative impacts: encouraging the conversion of nearby land to non-agricultural uses.[74] The EIR stated that there was little danger of the project causing further land conversion, since the project site was adjacent to industrial sites on three sides.[75]

The court rejected this reasoning, stating that because agricultural conservation easements protect land perpetually, they are an effective mitigation measure for the direct and cumulative impacts of a project because they prevent total resource exhaustion.[76] Though off-site mitigation through conservation easements does not replace the land lost at the project site, it does ensure that some agricultural land exists into the future because such easements prevent loss of similar land.[77] The court analogized this rationale to one used when evaluating mitigation for endangered species habitat losses—that land preserved elsewhere prevents total consumption of the species' habitat.[78] Additionally, the court feared that a failure to consider off-site agricultural conservation easements would undermine CEQA's public policy goals.[79] This is because finding agricultural conservation easements or other off-site measures categorically infeasible for

69. *Id.* at 241.

70. *Id.* at 233.

71. *Id.* "Prime farmland" is land which has "the best combination of physical and chemical features able to sustain long term agricultural production" and is designated as such by the California Department of Conservation's Farmland Mapping and Monitoring Program. *Important Farmland Categories*, CAL. DEP'T OF CONSERVATION, http://www.consrv.ca.gov/dlrp/fmmp/mccu/Pages/map_categories.aspx (last visited Oct. 6, 2013) (on file with the *McGeorge Law Review*); *Farmland Mapping and Monitoring Program*, CAL. DEP'T OF CONSERVATION, http://www.conservation.ca.gov/dlrp/ fmmp/Pages/Index.aspx (last visited May 31, 2014) (on file with the *McGeorge Law Review*).

72. *Masonite Corp.*, 218 Cal. App. 4th at 233.

73. *Id.* at 234.

74. *Id.* at 235–36.

75. *Id.* at 236.

76. *Id.* at 238.

77. *Id.* at 240.

78. *Id.* at 238–39 (describing numerous decisions in which courts have held that placing a conservation easement on a species' habitat elsewhere can mitigate the loss of habitat at a project site).

79. *Id.* at 241.

mitigation would deprive lead agencies of a useful tool to mitigate agricultural impacts.[80] Thus, the court held that agricultural conservation easements are a legally feasible mitigation measure for farmland losses.[81]

Masonite's holding that agricultural conservation easements are a legally feasible mitigation measure just establishes that these off-site easements are an acceptable method of reducing or minimizing the direct and cumulative impacts of a project on agricultural resources.[82] It does not mean that applicants must use conservation easements for agricultural mitigation.[83] An agricultural mitigation measure, like any other mitigation measure in an EIR, must be "economically" feasible before the project applicant is required to undertake it.[84]

However, the *Masonite* decision is instrumental in requiring that agricultural conservation easements be considered as a mitigation measure for farmland losses in EIRs.[85] It correctly interprets the meaning of mitigation to include off-site preservation of similar agricultural land to prevent a total loss of the resource.[86] It places a duty on the lead agency to determine whether this mitigation measure is achievable and removes uncertainty regarding whether agricultural conservation easements are an effective means of achieving mitigation.[87] Nevertheless, both developers and lead agencies reviewing project EIRs would benefit from a concrete, predictable ratio of farmland conserved to land consumed by a project.

C. Mitigation Measures Under CEQA Must be Feasible

CEQA aims to minimize the impacts of construction projects on the environment, but it does so in light of practical limitations that can impede environmental protection.[88] As stated before, CEQA requires mitigation of all significant environmental impacts identified in a project's EIR.[89] When deciding whether a mitigation measure or similar project change will be possible, lead

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80. *Id.*

81. *Id.*

82. *See id.* at 239–40 (discussing that projects still have to determine an easement's economic feasibility as the court and city did in *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*).

83. *Id.* at 241.

84. CAL. PUB. RES. CODE § 21081 (West 2007). For an example, in a more recent case, the Fifth Appellate District upheld Fresno County's determination that agricultural conservation easements were infeasible as mitigation for a 600-acre impact and adopted other mitigation methods. Friends of the Kings River v. Cnty. of Fresno, 232 Cal. App. 4th 105, 121 (5th Dist. 2014).

85. *Masonite Corp.*, 218 Cal. App. 4th at 241. The holding in *Friends of the Kings River* also reiterates this position. 232 Cal. App. 4th at 126. *Masonite* does not require that a project *use* agricultural conservation easements for mitigation, it only requires that a lead agency *consider* whether such a method would be feasible for the project. *Id.*

86. *Masonite Corp.*, 218 Cal. App. 4th at 241.

87. *Id.*

88. *See* PUB. RES. § 21081 (acknowledging that some "overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment).

89. PUB. RES. § 21002; CAL. CODE REGS. tit. 14, § 15021 (2014).

agencies and those preparing the EIR "may consider specific economic, environmental, legal, social, and technological factors."[90] This feasibility analysis limits the universe of potential alternatives and mitigation measures to those that are not prohibitively expensive or otherwise unattainable.[91]

CEQA defines "[f]easible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."[92] Limiting factors include whether potential mitigation measures conflict with existing plans for future growth or whether the costs of the measure would be disproportionately high.[93] When an agency can support its determination that particular mitigation measures are infeasible with substantial evidence, reviewing courts generally will not overturn the decision.[94] Because mitigation measures must be "roughly proportional to the impacts of a project" and economically realistic, feasibility limits may curtail CEQA's goal of environmental protection, regardless of the impacts.[95]

For example, in the EIR at issue in *Defend the Bay v. City of Irvine*,[96] the city found that it would be infeasible to modify the project to ensure on- or off-site agricultural use due to the city's increasing land values.[97] The city determined that the price of land near the project site ranged from $600,000 to $1,000,000 per acre.[98] The city also found that agricultural production could not be sustained

90. CAL. CODE REGS. tit. 14, § 15021.

91. *See* Citizens of Goleta Valley v. Bd. of Supervisors, 52 Cal. 3d 553, 574 (1990) (discussing the limitations of analyzing alternative sites for private projects, since it can be more difficult for private entities to move the project to another area because they lack eminent domain capabilities).

92. PUB. RES. § 21061.1. The CEQA Guidelines add legality as a factor that may be considered. CAL. CODE REGS. tit. 14 § 15364.

93. *See* Napa Citizens for Honest Gov't v. Napa Cnty. Bd. of Supervisors, 91 Cal. App. 4th 342, 364–65 (1st Dist. 2001) (rejecting a mitigation measure that was disproportionately costly); Envtl. Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018, 1039 (3d Dist. 2006) (rejecting a mitigation measure that was disproportionately costly); Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261, 1269–70 (4th Dist. 2004) (rejecting a mitigation measure that would conflict with the general plan).

94. *See Napa Citizens for Honest Gov't*, 91 Cal. App. 4th at 364 (noting that since the project would only contribute a "small percentage" of the traffic congestion on a nearby highway, it would be inappropriate to place the expense of improving the highway as a whole on a developer); San Bernardino Valley Audobon Soc'y, Inc. v. Cnty. of San Bernardino, 155 Cal. App. 3d 738, 753 (4th Dist. 1984) (discussing the requirement that the agency must explain why an alternative is infeasible). Lacking an explanation of infeasibility, the decision will be overturned. *Id.*

95. *See Napa Citizens for Honest Gov't*, 91 Cal. App. 4th at 364 (holding that because there were no feasible traffic mitigation measures for this project, its significant traffic impacts will not be reduced). Even measures to protect sensitive populations, like endangered species, can be found infeasible and must be discarded in favor of economically feasible measures. *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1039–40.

96. 119 Cal. App. 4th 1261 (4th Dist. 2004).

97. CITY OF IRVINE, *Section 4.2: Agricultural Resources*, *in* DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE NORTHERN SPHERE AREA at 4-41 to -42 (2001), *available at* http://sphere.ci.irvine.ca.us/img/Section4_2.pdf (on file with the *McGeorge Law Review*).

98. *Id.* at 4-31.

on land valued at greater than $30,000–$35,000 per acre.[99] This meant that agriculture in the area would not be able to support itself in the long term, even if land was dedicated to that purpose.[100] The court found that the City of Irvine had adequately explained why mitigating agricultural losses for this project would be infeasible.[101] Similarly, the Natomas Basin Habitat Conservation Plan's EIR—at issue in *Environmental Council of Sacramento v. City of Sacramento*—concluded that paying a mitigation fee for a ratio greater than one-half acre for every acre developed would become infeasible as land prices in the area continued to rise.[102] The Natomas area had seen mitigation fees more than double between 1997 and 2001 when the plan was being reevaluated.[103] While the current fee rate was not infeasible, the trend suggested that the mitigation fee would become economically infeasible in the future because the fees would "exceed the impact caused by [the] project[ ]" even though the expected income from the project might increase over time.[104] This explanation was satisfactory to the reviewing court and the EIR's determination of infeasibility was upheld.[105]

The feasibility limits that affect potential mitigation measures also affect the measures available to reduce impacts to agricultural land.[106] Especially in more developed areas, it is often prohibitively expensive to try to protect agricultural land.[107] Purchasing a conservation easement costs less than an outright purchase of the land because the buyer only acquires certain rights related to ensuring that the land will remain in an agricultural use.[108] Even so, as property values continue to increase in California,[109] the rights involved in a conservation easement may

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99. *Id.*

100. *Id.*

101. *Defend the Bay*, 119 Cal. App. 4th at 1271.

102. 142 Cal. App. 4th 1018, 1041 (3d Dist. 2006).

103. ECONOMIC & PLANNING SYSTEMS, INC., *Economic Analysis of Natomas Basin Habitat Conservation Plan*, *in* 2 FINAL NATOMAS BASIN HABITAT CONSERVATION PLAN 13 (2003), *available at* https://www.co.sutter.ca.us/ pdf/cs/pc/NBHCP_Vol_2.pdf (on file with the *McGeorge Law Review*).

104. *Id.*; *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1039.

105. *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1041 (stating that the agencies had adequately explained why the fees would be infeasible at a one-to-one mitigation ratio and supported the 0.5-to-one ratio such that the court could not "second-guess" their findings).

106. *See* Cherry Valley Pass Acres & Neighbors v. City of Beaumont, 190 Cal. App. 4th 316, 350–51 (4th Dist. 2010) (finding that mitigating for loss of agricultural land using agricultural easements was infeasible because of the trend of farming operations moving eastward, out of the project area).

107. *Id.* at 351; Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261, 1269–70 (4th Dist. 2004).

108. *All About Conservation Easements*, THE NATURE CONSERVANCY, http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml (last visited July 12, 2014) (on file with the *McGeorge Law Review*).

109. *See* Dan Walters, *California Property Values Soar*, SACRAMENTO BEE, Aug. 2, 2013, http://www.sacbee.com/2013/08/02/5617789/dan-walters-california-property.html (on file with the *McGeorge Law Review*) (stating that property values in the state began rising in 2012 and were expected to continue rising); Cynthia Nickerson et al., *Trends in U.S. Farmland Values and Ownership*, ECON. INFO. BULL. (U.S. Dept. of Agric. Econ. Research Serv.), Feb. 2012, at 25, *available at* http://www.ers.usda.gov/media/377487/ eib92_2_.pdf (on file with the *McGeorge Law Review*) (discussing that California farmland values remained strong despite the downturn beginning between 2008 and 2009).

correspondingly increase in price. If the cost of acquiring conservation easements on enough acreage to mitigate the project's impacts were equal or greater than the impacts of the project, an EIR would likely find the mitigation measure infeasible.[110]

Additionally, it becomes impractical to protect land that may eventually become a small island of agriculture surrounded by a city.[111] Since agricultural conservation easements endure forever,[112] it is conceivable that all agricultural land uses near urbanized land would end except those on protected land.[113]

While *Masonite* indicates that it is mandatory to look into off-site mitigation for agricultural impacts, such mitigation will not take place unless it is feasible.[114] Feasibility will always be a point of uncertainty in the CEQA process[115] and a feasibility analysis has the potential to limit the real-world applicability of any baseline mitigation ratio, including the one proposed in this Comment.

IV. CREATING A RATIO FOR AGRICULTURAL MITIGATION THROUGH EXAMINATION OF EXISTING CONSERVATION AND PLANNING PROGRAMS

Since *Masonite* affirmatively requires examining off-site mitigation for impacts to agricultural land, one of the main questions regarding appropriate mitigation of farmland loss has been resolved.[116] Though this answer is instrumental in guiding future lead agency decisions, it does not resolve uncertainty regarding how much land to conserve in order to mitigate a project's impact. When a lead agency attempts to decide whether a mitigation measure is economically feasible, the agency must know how much land to conserve to offset the development's environmental impacts.[117] Other conservation programs

110. *See Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1039 (explaining that an equal ratio requirement of land preserved for land used was infeasible because the developer would pay more fees than necessary to offset the impact of a project).

111. *See Cherry Valley Pass Acres & Neighbors*, 190 Cal. App. 4th at 351 (documenting that encroaching urban development rising land values have caused farmers to move out of the area).

112. *See supra* Part II.B.

113. *See* Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261, 1269 (4th Dist. 2004) ("[L]arge scale agriculture will not be economically viable in the long run in Orange County, because of increasing land prices . . . higher water and labor costs, [and] higher property taxes . . . .").

114. Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230, 241 (1st Dist. 2013) (discussing that the feasibility of using agricultural conservation easements as mitigation is a separate analysis that must be done).

115. *See Cherry Valley Pass Acres & Neighbors*, 190 Cal. App. 4th at 350 (stating that feasibility is a question of fact that must be supported by substantial evidence).

116. *See* Safran, *supra* note 52, at 18 (acknowledging the uncertainty over whether off-site agricultural conservation is an acceptable mitigation method).

117. *See Defend the Bay*, 119 Cal. App. 4th at 1269–70 (discussing the EIR's determination that on-site and off-site agricultural mitigation was economically infeasible based on the land area available in the region and its value).

allow off-site mitigation at particular ratios and these ratios can be used as a comparison tool to determine a baseline ratio for agricultural land conservation.[118]

This section will examine the historically acceptable mitigation ratios for conserving endangered species habitat and wetland areas impacted by projects subject to CEQA. It will also discuss existing farmland mitigation ratios adopted by particular counties and cities. Finally, it will apply the common concepts to a statewide agricultural mitigation ratio.

A. California's Mitigation Ratios for Endangered Species Habitat

When a project may have a significant effect on an endangered species and its habitat, the project proponent must mitigate those effects.[119] Currently, California law does not prescribe a particular ratio of habitat preserved to habitat conserved.[120] CEQA does state that substituting environments or resources for those lost is an acceptable form of mitigation.[121] Courts have upheld several off-site mitigation ratios in various EIRs.[122] These ratios range from one half-acre to two acres conserved for every acre of endangered species' habitat destroyed by a project.[123] Some EIRs also include two ratios: one for conserving existing habitat and one for generating new habitat for the species, with the former ratio larger than the latter in an effort to maintain no net loss of the resource.[124]

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118. *See, e.g.*, Preserve Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 278 (4th Dist. 2012) (upholding a habitat conservation plan with a one-to-one conservation ration as mitigation for impacts to endangered species).

119. *See* CAL. CODE REGS. tit. 14, § 15065(a) (2014) (requiring finding a "significant effect on the environment" when a project may "substantially reduce the number or restrict the range of an endangered . . . species"); Envtl. Council of Sacramento v. City of Sacramento 142 Cal. App. 4th 1018, 1038 (3d Dist. 2006) ("CEQA *requires* project proponents to mitigate all significant environmental impacts of their project . . . and [the California Endangered Species Act] *compels* applicants to 'fully mitigate[]' the take of threatened or endangered species . . . .") (emphasis in original).

120. *See. Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1039 (discussing the plaintiff's desire to require a one-to-one mitigation ratio and the city's determination that anything greater than a half acre of mitigation for every acre consumed would be disproportionate).

121. CAL. CODE REGS. tit. 14, § 15370(e) (2014).

122. *See, e.g.*, *Preserve Wild Santee*, 210 Cal. App. 4th at 278 (upholding an EIR's one-to-one ratio for off-site habitat conservation); Cal. Native Plant Soc'y v. City of Rancho Cordova, 172 Cal. App. 4th 603, 610–11 (3d Dist. 2009) (upholding a ratio where for every acre consumed, two acres of existing habitat must be conserved or one acre of habitat must be restored or created); Endangered Habitats League, Inc. v. Cnty. of Orange, 131 Cal. App. 4th 777, 794 (4th Dist. 2005) (discussing the EIR's mitigation plan that included off-site preservation of at least two acres of habitat for every acre consumed).

123. *See, e.g*,. *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1038 (0.5-to-one mitigation ratio); *Cal. Native Plant Soc'y*, 172 Cal. App. 4th at 610–11 (two-to-one mitigation ratio).

124. *See Cal. Native Plant Soc'y*, 172 Cal. App. 4th at 610–11 (discussing the EIR's different ratios, a one-to-one ratio for new habitat created or restored for the species or a two-to-one ratio for existing habitat conserved); CITY OF RANCHO CORDOVA, THE PRESERVE AT SUNRIDGE DRAFT ENVIRONMENTAL IMPACT REPORT VOL. 1 at 4.9-33 to -35 (2005), *available at* http://www.cityofranchocordova.org/ftp/large_docs/The%20Preserve%20at%20Sunridge%20-%20Volume%20I.pdf (on file with the *McGeorge Law Review*) (stating that the mitigation goal was to conserve enough acreage so there was no net loss in habitat for species).

The difference in the acceptable ratios is typically due to a difference in the kind of impact the project will have and the feasibility of preserving other habitat in the area.[125] The similarity among all of these ratios reflects the reasoning behind off-site mitigation; that is, even though the habitat at the project site will be lost forever, similar habitats for endangered species will be preserved into the future in an attempt to reduce the project's harm to the environment.[126] Instead of allowing for complete habitat loss, off-site mitigation ensures that hospitable areas remain for endangered populations.[127] This is the same reasoning that underlies the use of off-site agricultural conservation easements as a mitigation measure.[128]

Despite the similar rationales behind off-site habitat mitigation and off-site agricultural mitigation, the means of mitigating habitat losses can be quite different. A project applicant can restore or create habitat for a species elsewhere,[129] which facilitates a mitigation strategy where there is no net loss of habitat. Though this restoration is a long, expensive, and uncommon process, it can be done.[130] However, agricultural land is more difficult or arguably impossible to restore.[131] A ratio that requires restoration or creation of agricultural lands would not be ideal for that reason.

B. Wetland Compensatory Mitigation Ratio

Wetlands are areas of land that are "inundated or saturated by surface or ground water" frequently enough to support "a prevalence of vegetation typically

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125. *See Preserve Wild Santee*, 210 Cal. App. 4th at 272 (discussing that because the development would only affect approximately 991 acres of Quino checkerspot butterfly habitat, off-site mitigation acreage is lessened because of the capability to mitigate impacts on the project site); *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1025 (justifying a half acre of habitat preserved for every acre lost because the habitat to be preserved is of a higher quality than the project site).

126. Masonite Corp. v. Cnty of Mendocino, 218 Cal. App. 4th 230, 238–39 (1st Dist. 2013).

127. *Preserve Wild Santee*, 210 Cal. App. 4th at 272.

128. *See supra* Part III.B.

129. *See generally* U.S. FISH & WILDLIFE SERV., INITIATIVE AREAS OF CALIFORNIA, NEVADA, AND THE KLAMATH BASIN OF OREGON 10–11, (2006), *available at* http://www.fws.gov/cno/conservation/Initiative_Areas_brochure_dft_12-2006.pdf (on file with the *McGeorge Law Review*) (discussing the Service's efforts in restoring habitat in the Klamath River basin).

130. *See* William Yardley, *Removing Barriers to Salmon Migration*, N.Y. TIMES, July 29, 2011, http://www.nytimes.com/2011/07/30/us/30dam.html?_r=0 (on file with the *McGeorge Law Review*) (stating that a dam removal and river restoration project to facilitate salmon spawning in the Elwha River was authorized in 1992, but the first dam was not removed until 2011 and the removal process is expected to last into 2014) The total cost of the project is estimated at $350 million. *Id.* Because of the extreme costs of large-scale habitat restoration and recreation, it is rarely undertaken in CEQA projects. *See, e.g.*, *Preserve Wild Santee*, 210 Cal. App. 4th at 272 (achieving mitigation goals through conservation easements both on- and off-site and active species management plans rather than creating Quino habitat elsewhere); *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1040 (opting to preserve higher quality habitat currently in existence instead of other, more expensive options).

131. *See infra* Part IV.D.

adapted for life in saturated soil conditions."[132] Wetlands are very important to waterway health but are also very delicate ecosystems and face development pressures similar to those faced by agricultural land.[133] Although CEQA does not specifically mention wetland impacts among those that are considered significant environmental effects,[134] agencies like the California Coastal Commission (Coastal Commission) have regulations and review procedures that govern mitigation when a wetland site will be modified in the long term.[135] In its review process, the Coastal Commission considers the method and location of the proposed mitigation when determining if a mitigation plan's ratio is adequate and tends to approve only those mitigation plans where the ratio calls for preserving or restoring several wetland acres for every acre that a project impacts.[136]

Wetland mitigation can take several acceptable forms.[137] Compensatory mitigation methods are common and include restoring historic wetland sites, paying fees for "in-lieu mitigation," and participating in mitigation banking.[138] Wetland enhancement, in which the project applicant improves an existing wetland, is another alternative.[139] Enhancement does not support the Coastal Commission's goal of no net loss of wetlands because it only improves a wetland, and is generally used in conjunction with other forms of wetland mitigation.[140]

In addition to the form the mitigation measure takes, the Coastal Commission also considers the project's type, location, and whether the mitigation will take place off-site. [141] Given the fragile nature of wetlands and the uncertainty involved in restoration success, the Coastal Commission attempts to err on the side of caution and approves ratios where more wetland acreage is protected than consumed.[142] Oftentimes, the Coastal Commission will require a four-to-one

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132. 33 C.F.R. § 328.3(b) (2009).

133. U.S. ENVTL. PROTECTION AGENCY, WETLANDS OVERVIEW 1–2 (2004), *available at* http://water.epa.gov/type/wetlands/outreach/upload/overview.pdf (on file with the *McGeorge Law Review*).

134. *See* STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 20.74 (CEB 2013) (noting that wetland effects are often considered throughout the CEQA and construction process because of other state and federal laws governing wetland impacts).

135. *Development Permit Review Process*, *supra* note 55, § III(B)(3).

136. *Procedural Guidance for Evaluating Wetland Mitigation Projects in California's Coastal Zone: 4. General Procedures for Evaluating the Performance of Wetland Mitigation Projects*, CAL. COASTAL COMM'N, § 4.2.3.1–.3, http://www.coastal.ca.gov/web/weteval/we4.html (last visited Jan. 5, 2014) (on file with the *McGeorge Law Review*) [hereinafter *Evaluating Wetland Mitigation Projects*].

137. *Id.* § 4.2.3.1.

138. *Development Permit Review Process*, *supra* note 55, § III(B)(3). Mitigation banking involves government organizations or third parties that restore wetland areas and provide developers with "mitigation credits." U.S. ENVTL. PROTECTION AGENCY, *Mitigation Banking Factsheet*, WATER.EPA.GOV, http://water.epa.gov/lawsregs/guidance/wetlands/mitbanking.cfm (last visited Jan. 5, 2014) (on file with the *McGeorge Law Review*).

139. *Evaluating Wetland Mitigation Projects*, *supra* note 136, § 4.2.3.1.

140. *Id.*

141. *Id.* at § 4.2.3.3.

142. *Id.*

ratio.[143] When the success of a project's mitigation plan is uncertain, the Coastal Commission may require an even greater ratio than four-to-one.[144]

C. Existing Agricultural Mitigation Ratios in City and County General Plans

Though California courts have had difficulty determining whether off-site mitigation can mitigate impacts to agricultural land, several counties and cities require their own agricultural mitigation and have set a minimum mitigation ratio for projects constructed within their borders.[145] These conservation plans are found in the city or county's general plan—a document that sets out the growth policy for the particular entity.[146] These plans include the overarching goals and policies for land uses, such as conservation, traffic circulation, housing, and open space, which includes agricultural land uses.[147] Because general plans establish the policy goals for a particular city or county, they can create additional requirements beyond those of CEQA for development projects within the plan area.[148] The mitigation ratios for agricultural land losses required by municipal governments are instructive as to what levels of mitigation are generally feasible and adequate to reduce a project's impacts.[149]

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143. *See* CAL. COASTAL COMM'N, STAFF REPORT AND RECOMMENDATION ON CONSISTENCY DETERMINATION: U.S. IMMIGRATION AND NATURALIZATION SERVICE, NO. CD-063-03, 29 (2003), *available at* http://www.coastal.ca.gov/cd/W8a-10-2003.pdf (on file with the *McGeorge Law Review*) (indicating that "the Commission normally requires a 4:1 ratio).

144. *See id.* (discussing that larger ratios have been required when the mitigation may be only partially successful).

145. *See, e.g.*, YOLO CNTY., 2030 COUNTYWIDE GENERAL PLAN: AGRICULTURE AND ECONOMIC DEVELOPMENT ELEMENT, at AG-20 (2009), *available at* http://www.yolocounty.org/home/showdocument ?id=14465 (on file with the *McGeorge Law Review*) (requiring conservation of one acre of agricultural land for every converted acre in order to maintain the county's agricultural economy); STANISLAUS CNTY., GENERAL PLAN app. B, 7-37 (1994), *available at* http://www.stancounty.com/ planning/pl/gp/gp-ag-element-b.pdf (on file with the *McGeorge Law Review*) [hereinafter STANISLAUS GENERAL PLAN] (requiring one acre of farmland preserved for every acre consumed); CITY OF DAVIS, DAVIS GENERAL PLAN 295 (2007), *available at* http://cityofdavis.org/Media/Default/Documents/PDF/CDD/Planning/Plans-Documents/GP/006-15-Agriculture,-soils,-and-Minerals.pdf (on file with the *McGeorge Law Review*) [hereinafter CITY OF DAVIS GENERAL PLAN] (requiring that new developments on the periphery of the city mitigate impacts to agricultural land by conserving two acres for every acre consumed).

146. GOVERNOR'S OFFICE OF PLANNING & RESEARCH, *A Citizen's Guide to Planning*, CERES.CA.GOV (Jan. 2001), http://ceres.ca.gov/planning/planning_guide/plan_index.html#anchor156525 (on file with the *McGeorge Law Review*); CAL. GOV'T CODE § 65300 (West 2010).

147. GOV'T § 65302.

148. *See* STANISLAUS GENERAL PLAN, *supra* note 145, at 7-22 to -23 (stating that when a project proposes to change agricultural land to a residential land use designation, the city requires mitigation according to their Farmland Mitigation Program). A general plan amendment like this is considered a project subject to CEQA. CAL. CODE REGS. tit. 14, § 15378(a)(1) (2014).

149. *See, e.g.*, STANISLAUS GENERAL PLAN, *supra* note 145, at 7-22 to -23; CITY OF DAVIS GENERAL PLAN, *supra* note 145, at 295; LOCAL AGENCY FORMATION COMM'N OF SANTA CLARA CNTY., AGRICULTURAL MITIGATION POLICIES 2 (Apr. 2007), *available at* http://www.santaclara.lafco.ca.gov/images/pdf_files/ policies&procedures1/Agricultural%20Mitigation%20Policies.pdf (on file with the *McGeorge Law Review*) [hereinafter SANTA CLARA LAFCO].

Stanislaus County, recognizing that the conversion of land from agricultural uses to urban uses has "far-reaching impacts on . . . land, water and air resources," has developed a comprehensive farmland mitigation program.[150] This program requires preserving one acre of farmland for every acre lost to development.[151] It also designates the acquisition of agricultural conservation easements as the main method of meeting the county's mitigation requirement.[152] The City of Davis also requires that projects on the edges of the city mitigate agricultural losses, but at a two-to-one ratio.[153] A Santa Clara County regional planning agency, although not requiring agricultural mitigation, recommends a one-to-one mitigation ratio for prime agricultural land converted to other uses.[154] These examples show that local governments, even those in more urban areas like the Silicon Valley, believe that agricultural mitigation at a ratio of at least one-to-one promotes the goal of reducing development impacts on farmland while ensuring that the mitigation method is not infeasible. These smaller-scale agricultural mitigation programs are useful models for a statewide agricultural mitigation ratio for projects subject to CEQA that impact farmland.

Though several local governments already institute their own agricultural mitigation programs, a statewide approach would have the added benefit of providing a standardized baseline for agricultural mitigation. This uniformity would help both developers and lead agencies anticipate the mitigation required for a proposed project, rather than leaving the determination open to the agency.[155] A standard, statewide ratio would promote predictability and equality in CEQA because developers and agencies in any jurisdiction would be required to analyze the feasibility of the same level of agricultural mitigation.[156]

D. A One-to-One Mitigation Ratio for Agricultural Mitigation Throughout California

Wetland mitigation ratios and some endangered species habitat mitigation ratios base the larger acreage required for mitigation on the idea that similar environments can be restored or created elsewhere.[157] Agricultural land is not so

150. STANISLAUS GENERAL PLAN, *supra* note 145, at 7-21 to -22.

151. STANISLAUS GENERAL PLAN, *supra* note 145, at 7-36.

152. *Id.* at 7-37.

153. CITY OF DAVIS GENERAL PLAN, *supra* note 145, at 295.

154. SANTA CLARA LAFCO, *supra* note 149, at 2.

155. *See* Citizens for Open Gov't v. City of Lodi, 205 Cal. App. 4th 296, 322 (3d Dist. 2012) (discussing the city's choice of a one-to-one mitigation ratio over the plaintiff's suggested two-to-one ratio).

156. *See* ELISA BARBOUR & MICHAEL TEITZ, CEQA REFORM: ISSUES AND OPTIONS at iii–iv (2005), *available at* http://www.ppic.org/content/pubs/op/OP_405EBOP.pdf (on file with the *McGeorge Law Review*) (stating that risks related to "uncertain and inconsistent requirements" can increase costs to developers and that uniform standards can help eliminate the uncertainty inherent in CEQA's statutory language).

157. *See Evaluating Wetland Mitigation Projects*, *supra* note 136, at § 4.2.3.3 (requiring a larger mitigation ratio because of the uncertainty surrounding the success of a restoration attempt); Cal. Native Plant Soc'y v. City of Rancho Cordova, 172 Cal. App. 4th 603, 610–11 (3d Dist. 2009) (establishing a ratio where for

easily restored or created anew because, as a practical matter, it would often require that other kinds of open space be converted to agricultural production.[158] This conversion, however, conflicts with other conservation policy goals.[159] Farmland is typically considered a finite resource, which once lost, is lost permanently.[160] Therefore, a mitigation ratio that leads to no net loss of agricultural lands, like a two-to-one ratio, would not appear to be feasible since these ratios generally require some restoration of the land lost to development.

Additionally, the certainty of both the immediate and long-term success of agricultural land conservation is greater than that of wetlands. In a wetland mitigation scenario, many variables—such as the time vegetation takes to establish before it can provide habitat for other organisms or the ability of the required species to settle into the mitigation area—can impact the effectiveness of mitigation.[161] In contrast, agricultural mitigation protects land currently in use for agricultural production, which leaves little room for uncertainty about the ability of the substitute land to actually compensate for the land consumed by a given project.[162] Given the greater certainty about the effectiveness of agricultural mitigation, a conservative four-to-one is overkill.

A one-to-one mitigation ratio, like that seen in several general plans[163] would be sufficient because the land placed under easement would be suitable for agricultural production and would preserve agricultural land without severely limiting development opportunities. In their amicus curiae brief for the *Masonite* case, the California Farm Bureau Federation also advocated for a one-to-one mitigation ratio.[164] This ratio allows for development to continue while still preserving "at least half of the agricultural land in a region."[165] Given that it is difficult to restore farmland from other uses and that counties like Stanislaus have long required the same ratio,[166] preserving one acre of farmland for every acre consumed appears to be a reasonable mitigation ratio.

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every acre consumed, two acres of existing habitat must be conserved or one acre of habitat must be restored or created).

158. Bldg. Indus. Ass'n of Cent. Cal. v. Cnty. of Stanislaus, 190 Cal. App. 4th 582, 592 (5th Dist. 2010).

159. *See, e.g.*, CAL. FISH & GAME CODE § 2051 (West 2013) (indicating that conservation of fish, wildlife, and plants is a concern); 16 U.S.C.A. § 1531 (West 2010) (prioritizing the conservation of endangered and threatened species); CAL. PUB. RES. CODE § 5811 (West 2001) (recognizing a need for wetlands preservation).

160. *Bldg. Indus. Ass'n of Cent. Cal.*, 190 Cal. App. 4th at 592.

161. Mary E. Kentula, *Restoration, Creation, and Recovery of Wetlands*, *in* NATIONAL WATER SUMMARY ON WETLAND RESOURCES: U.S. GEOLOGICAL SURVEY WATER-SUPPLY PAPER 2425, http://water.usgs.gov/nwsum/WSP2425/restoration.html (last visited May 31, 2014) (on file with the *McGeorge Law Review*).

162. *See supra* Part II.B.

163. *See supra* Part IV.C.

164. Brief for the Cal. Farm Bureau Fed'n as Amicus Curiae at 9, Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230 (1st Dist. 2013) (No. A134896) (on file with the *McGeorge Law Review*).

165. *Id.*

166. STANISLAUS GENERAL PLAN, *supra* note 145, at 7-36.

V. LAND CONSERVED FOR MITIGATION SHOULD BE OF EQUIVALENT QUALITY AND LOCATED TO ENSURE THE LONGEVITY OF CALIFORNIA AGRICULTURE

For conserved agricultural land to properly mitigate losses at a project site, the land quality is as important as the quantity preserved.[167] Conserved land should be of a similar quality so that the cumulative impacts of a project are actually minimized.[168] Additionally, in order to ensure that agricultural conservation easements remain a feasible mitigation measure, proximity of the protected land to the project site should not be essential. This section will first explore a means for matching the quality of different acreage and will then discuss location concerns for placing agricultural conservation easements.

A. A Soil and Land Use Approach to Determining Quality

The California Department of Conservation's Farmland Mapping and Monitoring Program (FMMP) analyzes and maps agricultural acreage throughout the state.[169] This includes classifying land into different quality categories based on soil characteristics and irrigation status.[170] FMMP classifies agricultural land into one of five categories: prime farmland, farmland of statewide importance, unique farmland, farmland of local importance, and grazing land.[171] The highest quality land is designated as prime farmland.[172] Prime farmland has soil that has a particular combination of physical and chemical characteristics—such as high quality soil, a good moisture supply, and an appropriate growing season—that allow it to produce high crop yields.[173] Prime farmland must also have been used in irrigated production agriculture in the four years preceding the date of classification.[174] Farmland of statewide importance is slightly inferior to prime farmland in some ways, such as the soil's ability to retain moisture or the physical landscape of the land.[175] Crops grown in prime farmland and farmland of statewide importance include nut and fruit trees, grapevines, strawberries, and lettuce.[176] Unique farmland does not have to be irrigated and has lower quality

167. *See* Bldg. Indus. Ass'n of Cent. Cal. v. Cnty. of Stanislaus, 190 Cal. App. 4th 582, 588 (5th Dist. 2010) (discussing mitigating agricultural losses with land of equivalent quality).

168. *See id.* (discussing the County's General Plan requirement of mitigating agricultural land losses with land of equal quality elsewhere in the county to minimize the impacts of that loss).

169. *Farmland Mapping and Monitoring Program*, *supra* note 71.

170. *Id.*

171. *Important Farmland Categories*, *supra* note 71. Note that only the first three categories are considered "agricultural land" for determining the environmental impacts to farmland under CEQA. CAL. PUB. RES. CODE § 21060.1 (West 2007).

172. *Important Farmland Categories*, *supra* note 71.

173. *Id.*

174. *Id.*

175. *Id.*

176. FRESNO CNTY., FRESNO COUNTY GENERAL PLAN UPDATE: PUBLIC REVIEW DRAFT ENVIRONMENTAL IMPACT REPORT 4.3-13 (2000), http://www2.co.fresno.ca.us/4510/4360/General_Plan/GP_

soils.[177] Oranges, avocados, and cut flowers are frequently grown on unique farmland.[178] A county board of supervisors and advisory committee designates land as farmland of local importance based on its contribution to the region's agricultural economy.[179] Finally, grazing land is land that is not used for crop production and supports animal grazing with its natural plant life.[180]

The Department of Conservation classifies most agricultural land within the state and generates a map of the state's agricultural lands.[181] The FMMP's farmland quality designations provide a useful framework for comparing the quality of land lost at a project site to the quality of land that must be conserved as a mitigation measure. If a project will convert several acres of prime farmland to non-agricultural use, then the acreage preserved elsewhere should also be designated prime farmland to adequately mitigate the impacts.[182] In this scenario, conserving farmland of statewide importance or unique farmland would not be adequate mitigation because the land quality is inferior to what is lost. If there is no correlation in quality between the land converted and the land conserved, then the mitigation value is less than it would be if the qualities matched. In a one-to-one mitigation ratio, the acres conserved should be of the same FMMP quality classification as those affected by the project.

B. Location, Location, Location: Not the Main Concern for Agricultural Mitigation

When developers remove land from agricultural production, the effects are felt locally as well as throughout the state.[183] In order to maintain a thriving agricultural economy in a state, a critical amount of farmland must exist.[184] This

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Final_EIR/EIR/Ag4-3.pdf (on file with the *McGeorge Law Review*).

177. *Important Farmland Categories*, *supra* note 71.

178. *Important Farmland Mapping Categories and Soil Taxonomy Terms*, CAL. DEP'T. OF CONSERVATION, http://www.conservation.ca.gov/dlrp/fmmp/Documents/soil_criteria.pdf (last visited Feb. 9, 2014) (on file with the *McGeorge Law Review*).

179. *Important Farmland Categories*, *supra* note 71.

180. *Id.*

181. *FMMP Survey Area*, CAL. DEP'T OF CONSERVATION, http://www.conservation.ca.gov/dlrp/fmmp/overview/Pages/survey_area_map.aspx (last visited July 19, 2014) (on file with the *McGeorge Law Review*).

182. *See* STANISLAUS GENERAL PLAN, *supra* note 145, at 7-39 (requiring that land used for mitigation be of equal or better quality to the land consumed for adequate mitigation).

183. *See* Brief for the Cal. Farm Bureau Fed'n as Amicus Curiae at 10, Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230 (1st Dist. 2013) (No. A134896) (presenting the example of Orange County, where virtually all farmland is now owned by developers and individual farmers have no choice but to lease farmland); AB 823 – CALIFORNIA FARMLAND PROTECTION ACT FACT SHEET 1 (Office of Assemb. Susan Talamantes Eggman, Mar. 4, 2013) (on file with the *McGeorge Law Review*) ("A thriving agricultural sector is critical to the long-term strength of California's economy . . . we must ensure that appropriate policies are in place to preserve valuable agricultural land.").

184. *See* Or. Dep't of Land Conservation and Dev., *DLCD Farmland Protection Program*, OREGON.GOV, http://www.oregon.gov/LCD/Pages/farmprotprog.aspx (last visited Oct. 6, 2013) (on file with the *McGeorge*

is because agricultural and residential land uses are not very compatible, given that agricultural land use typically involves noisy machinery and can release unpleasant odors.[185] As complaints arise and land values increase, it becomes more tempting for farmers or ranchers to sell their land for development.[186]

Ideally, a mitigation strategy would help maintain the necessary critical mass of farming operations in a particular region by keeping the mitigation benefits within the region.[187] However, where infeasible, preserving agricultural land elsewhere in California would help ensure that California's agricultural economy remains viable in the future.[188] Because agricultural land loss impacts extend beyond local significance, the search for equivalent land for conservation should be on a statewide scale and not "limited strictly to land within the project's surrounding area."[189] Protecting consecutive areas of agricultural land reduces the negative agricultural impacts of leapfrogging urban and agricultural land uses.[190] Increasing the universe of potential land for mitigation to all equivalent land should enable the protection of larger blocks of land, since narrow political or geographical boundaries would not confine local agencies searching for land suitable for mitigation. Ideally, this would also decrease the frequency of finding the use of agricultural conservation easements infeasible, because it would avoid the problems associated with using high-value, close-proximity land to replace impacted land.[191]

VI. CONCLUSION

The basic goal of CEQA is to reduce the environmental impacts of development projects by requiring mitigation of those impacts.[192] The California legislature has emphasized that impacts on agricultural resources should be

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Law Review) (describing the necessity of maintaining a "critical mass" of agriculture to the longevity of Oregon's agricultural economy).

185. *Id.* (discussing the conflicts that can arise between residential areas and farming operations).

186. *See* Cherry Valley Pass Acres & Neighbors v. City of Beaumont, 190 Cal. App. 4th 316, 351 (4th Dist. 2010) (documenting that rising land values have caused farmers to move out of the area); Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261, 1269 (4th Dist. 2004) ("[L]arge scale agriculture will not be economically viable in the long run in Orange County, because of increasing land prices . . ., higher water and labor costs, [and] higher property taxes . . . .").

187. *Bldg. Indus. Ass'n of Cent. Cal.*, 190 Cal. App. 4th at 592 (stating that the county requires protecting other agricultural land in the county to ensure agricultural vitality in the area).

188. *See* Masonite Corp. v. Cnty. of Mendocino, 218 Cal. App. 4th 230, 236 (1st Dist. 2013) (encouraging preservation of agricultural lands statewide when land in the immediate area is unavailable).

189. *Id.* (quoting the Department of Conservation).

190. *See* Alvin D. Sokolow, *Budget Cuts Threaten the Williamson Act, California's Longstanding Farmland Protection Program,* 64 CAL. AGRIC. 118, 120 (2010) (stating that Williamson Act contracts, which require at least 100 acres to enroll, have been successful in protecting agricultural land from leapfrog development).

191. *See Defend the Bay*, 119 Cal. App. 4th at 1269 (finding that mitigating agricultural impacts would be infeasible because of the increasing land values in the immediate area).

192. CAL. PUB. RES. CODE § 21002 (West 2007).

considered when evaluating a project's environmental effects, and the *Masonite* court has provided a legally viable mitigation measure for such agricultural impacts in upholding the use of agricultural conservation easements.[193] Additionally, courts have accepted the use of similar conservation easements as mitigation measures for impacts on biological resources, which further supports the use of agricultural conservation easements as a mitigation tool.[194]

The *Masonite* decision is instrumental in establishing that agricultural conservation easements are an acceptable mitigation measure.[195] However, further clarity could be gained by outlining exactly what developers and lead agencies should expect to encounter in an EIR review involving agricultural conservation easements. An amendment to CEQA that includes a baseline mitigation ratio with land quality and location limitations would clarify the requirements of an EIR and show lead agencies what the minimum mitigation measures should be.

After comparing existing mitigation ratios for endangered species habitat and wetlands, it appears that fewer acres of agricultural land need to be preserved than are required for endangered species or wetlands.[196] Agricultural land's ability to produce is not particularly uncertain, and the land is difficult or impossible to restore from other uses.[197] Thus, a four-to-one, or even a two-to-one ratio may be overly burdensome to development because there would cease to be any land on which to build. A one-to-one ratio, as advocated by the California Farm Bureau and seen in county general plans for Stanislaus and Yolo, is an ideal ratio because it ensures that some farmland will remain while allowing for some urban expansion, especially in the Central Valley.[198]

The project applicant must also identify the acreage that will be conserved strategically. In order to best reduce the impacts that a project will have on particular agricultural resources, the land under conservation easement should match the quality of the land converted. The Department of Conservation's FMMP provides a ready-made mapping system of farmland quality, which can be used in a project's EIR to identify land that can be used as mitigation.[199] Each acre of land affected by the project should be mitigated by conserving a corresponding acre of land that is classified at the same quality level. Similarly, to better reduce project impacts on agricultural resources in California as a whole, land placed under easement could be located in any area of the state. This

193. *Masonite Corp.*, 218 Cal. App. 4th at 241.

194. *See supra* Part IV.A–B.

195. *See supra* Part III.B.

196. *See supra* Part IV.A–B.

197. *See supra* Part IV.D.

198. *See supra* Part IV.C–D. *See* PUB. POLICY INST. OF CAL., *Just the Facts: California's Central Valley*, PPIC.ORG (2006), http://www.ppic.org/content/pubs/jtf/JTF_CentralValleyJTF.pdf (on file with the *McGeorge Law Review*) (estimating that the population of the Central Valley had grown by one million residents in a ten-year period, and expecting its population to exceed 11 million by 2040).

199. *See supra* Part V.A.

would ensure that the state will better maintain its agricultural economy because development cannot squeeze agriculture out entirely.[200]

Taking all of this into consideration, the California legislature should amend CEQA to require that when using agricultural conservation easements as a mitigation measure, one acre must be placed under easement for every acre converted to non-agricultural use by the project. The amendment should also require that the conserved acre(s) be of an equivalent farmland quality as defined by the FMMP and that the acre(s) be located near land dedicated to agricultural uses whenever feasible. This amendment would provide needed clarity for developers and lead agencies alike when preparing and reviewing agricultural mitigation measures in EIRs.

200. *See supra* Part V.B.

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