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The Farmland Protection Policy Act: Stillbirth of a Policy

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THE FARMLAND PROTECTION POLICY ACT: STILLBIRTH OF A POLICY?

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I. INTRODUCTION

During the 1970's, many commentators expressed concern over the consequences of two apparently converging trends: the continuing increase in the demand for our nation's agricultural crops, and the increasing conversion of farmland to other uses, such as highways, reservoirs and, especially, urban growth.[1] Commentators suggested that farmland was becoming an endangered resource and that government should devise programs to address this problem. These apprehensions were confirmed, at least to some extent, by the final report in 1981 of the National Agricultural Lands Study (NALS), initiated by the United States Department of Agriculture (USDA) and the Council on Environmental Quality (CEQ).[2] The study reached an alarming conclusion:

> By the year 2000, most if not all of the nation's 540 million acre cropland base is likely to be in cultivation . . . .
>
> The United States has been converting agricultural land to nonagricultural uses at the rate of about three million acres per year—of which about one million acres is from the cropland base. This land has been paved over, built on, or permanently flooded, i.e., converted to nonagricultural uses. For practical purposes, the loss of this resource to U.S. agriculture is irreversible . . . .

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1. A seminar convened by the Land Use Committee of the United States Department of Agriculture (USDA) in 1975 addressed these concerns. USDA, PERSPECTIVES ON PRIME LANDS (1975); USDA, RECOMMENDATIONS ON PRIME LANDS (1975); *see also* W. FLETCHER & C. LITTLE, THE AMERICAN CROPLAND CRISIS (1982); PROTECTING FARMLANDS (F. Steiner & J. Theilacker eds. 1984); THE FARM AND THE CITY: RIVALS OR ALLIES? (A. Woodruff ed. 1980); THE FUTURE OF AMERICAN AGRICULTURE AS A STRATEGIC RESOURCE (S. Batie & R. Healy eds. 1980); U.S. GENERAL ACCOUNTING OFFICE, PRESERVING AMERICA'S FARMLAND—A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT [CED-79-109] (1979). Official concern, at the federal level, is discussed in Dunford, *The Evolution of Federal Farmland Protection Policy*, 37 J. SOIL & WATER CONSERVATION 133 (1982).

2. USDA, NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT (1981) [hereinafter cited as NALS].

. . . .

. . . The cumulative loss of cropland, in conjunction with other stresses on the U.S. agricultural system such as the growing demand for exports and rising energy costs, could seriously increase the economic and environmental costs of producing food and fiber in the United States during the next 20 years.[3]

The NALS study recommends that "[t]he national interest in agricultural land should be articulated by a Presidential or by a Congressional statement of policy"[4] and that "[p]ositive incentives should be designed within federal programs to encourage development away from good agricultural land and onto land less suited for agricultural uses."[5]

If the nation's future need for cropland is threatened seriously by the essentially irreversible conversion of cropland and potential cropland, then the government should devise programs to retard such conversion. The issue may even be a matter of considerable urgency, perhaps deserving of programs at least as tough as those protecting air, water, wildlife resources, and other land resources, such as wetlands, barrier islands, and lands threatened by surface mining.

In response to this evidence of a farmland conversion problem, Congress adopted the Farmland Protection Policy Act of 1981 (FPPA).[6] The Act, perhaps surprisingly, amounted to little more than a bland acknowledgement of concern, and carved out an extremely limited role for the federal government. When the USDA finally adopted rules for administering the FPPA,[7] the agency further minimized the federal role, so much so that the FPPA now appears lifeless.

The meaning of this sequence of events is unclear. Perhaps the toothless FPPA is merely a first, halting step toward an eventual aggressive policy. On the other hand, people now may simply not regard farmland retention as a serious national problem. Farmland retention, in fact, may not be a problem. At the same time that support was building for a vigorous national policy on farmland retention, a counterattack led by certain economists gathered momentum.[8] The NALS did not convince the doubters that a serious national problem existed; rather, it stimulated them to a more relentless attack. Whatever the truth, Congress and the current administration now seem convinced that farmland retention is not a serious national issue.

This article analyzes the Farmland Protection Policy Act of 1981 and the USDA rules for its administration. The article also reviews con-

3. *Id.* at v-vi.
4. *Id.* at xvii.
5. *Id.*
6. 7 U.S.C. §§ 4201-4209 (1982).
7. 7 C.F.R. §§ 658.1-.7 (1985).
8. Fischel, *The Urbanization of Agricultural Land: A Review of the National Agricultural Lands Study*, 58 LAND ECON. 236 (1982); Raup, *An Agricultural Critique of the National Agricultural Lands Study*, 58 LAND ECON. 260 (1982).

flicting attitudes as to the gravity of the farmland conversion problem and makes suggestions for shaping and effectuating national policy.

II. THE FARMLAND PROTECTION POLICY ACT OF 1981

The Act's statement of findings acknowledges that a national problem of considerable gravity exists. Included in the Act are findings that farmland is a "unique" natural resource "necessary for the continued welfare of the people of the United States," that a "large amount" of farmland each year is "irrevocably" converted from actual or potential agricultural use to nonagricultural use, and that this trend "may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets."[9] The threat this finding presents is qualified, however, because farmland conversion "may" endanger only the combined domestic and export needs, not domestic needs alone.

The scope of land brought within the ambit of the Act seems narrower than the above finding would indicate. If the nation is indeed facing a cropland shortage, the nation should seek to protect all cropland and potential cropland. But the Act restricts its definition of "farmland" to three categories: (1) "prime farmland" as determined by the Secretary of Agriculture; (2) "unique farmland . . . for production of specific high-value food and fiber crops, as determined by the Secretary," such as "citrus, tree nuts, olives, cranberries, fruits, and vegetables;" and (3) other cropland "of statewide or local importance" identified by state or local agencies and approved by the Secretary.[10]

The Act does not clearly delineate the contours of national policy to address the problem identified in the findings. Perhaps the strongest statement of policy is set forth, curiously, in the list of findings:

> [T]he Department of Agriculture and other Federal agencies should take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses in cases in which other national interests do not override the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources.[11]

This statement apparently requires that the USDA and other federal agencies determine the importance of retaining threatened farmland, that it balance that interest against other national interests, and that it develop effective measures to prevent conversion when the balancing process favors retention.

The Act states its "purpose" less broadly. The Act's purpose is to:

> minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricul-

9. 7 U.S.C. § 4201(a) (1982).
10. *Id.* § 4201(c)(1).
11. *Id.* § 4201(a)(7).

> tural uses, and to assure that Federal programs are administered in a manner that, to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland.[12]

This statement does not clearly contemplate balancing. It attaches primary importance to avoiding conflict with nonfederal programs, which may serve purposes in addition to cropland resource conservation, such as urban growth management, preserving local economies, continuing the family farm, and other stated or unstated policies.[13] Although these other purposes may be important policies, they hardly approach in importance an impending shortage of a basic resource. Moreover, they are not policies which the Act declares to be national policies approved by Congress. In effect, Congress has delegated national policymaking for farmland retention to state and local governments and private entities. The only restrictions on this delegation are that the Secretary of Agriculture concur in nonfederal designations of "farmland . . . of statewide or local importance"[14] and that federal programs be consistent with nonfederal programs only "to the extent practicable."[15]

The measures which the Act prescribes to implement national policy on farmland retention are woefully inadequate on their face. The Act only directs federal agencies to do three things. First, the USDA must develop criteria for "identifying the effects of Federal programs" on conversion.[16] Second, all units of the federal government must identify such effects, take them "into account," and "consider alternative actions, as appropriate, that could lessen such adverse effects."[17] Third, federal units must "assure" that federal programs are compatible with nonfederal farmland retention programs.[18] The Act expressly declares that it does "not authorize the Federal Government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such land."[19] Essentially, the Act relies upon self-restraint by federal agencies and makes no attempt to develop a positive program.

Furthermore, the Act has no provision to assure that agencies comply with the minimal "duties" which the Act places upon them. The USDA attempts to assist, not to oversee. The Act requires USDA reports to specified Senate and House committees "on the progress made in

12. *Id.* § 4201(b).

13. Programs of local governments, states, and private organizations are discussed in NALS, *supra* note 2, at 47-68; J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW ch. 4 (1982); E. ROBERTS, THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND (1982); Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591, 600-40 (1984); Thompson, *Protecting Agricultural Lands*, in LAND-SAVING ACTION 64, 65-72 (R. Brenneman & S. Bates eds. 1984).

14. 7 U.S.C. § 4201(c)(1)(C) (1982).

15. *Id.* § 4202(b).

16. *Id.* § 4202(a).

17. *Id.* § 4202(b).

18. *Id.*

19. *Id.* § 4208(a).

implementing the provisions of this chapter," but that duty is to report only one time—within one year after December 22, 1981.[20] The Act expressly forbids judicial enforcement of its provisions: "This chapter shall not be deemed to provide a basis for any action, either legal or equitable, by any State, local unit of government, or any person or class of persons challenging a Federal project, program or other activity that may affect farmland."[21]

III. ADMINISTRATIVE IMPLEMENTATION

In its administrative rulemaking, the USDA managed to render the Act even less effective than it appeared to be on its face. Opponents of the Act succeeded, to a remarkable extent, in persuading the USDA to eliminate from the Act any basis, real or imagined, for any federal action that would frustrate any of the land-use schemes of nonfederal owners.[22]

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20. *Id.* § 4207. On June 24, 1983, the USDA sent its four page report to Congress. Letter from John Block, Secretary of Argriculture, to Senator Jesse Helms, Chairman, Senate Committee on Agriculture, Nutrition and Forestry (June 24, 1983), *reprinted in* Schnidman, *Agricultural Land Preservation: The Evolving Federal Role*, in LAND USE REGULATION AND LITIGATION app. XIV at 242 (1984) (ALI-ABA Course of Study Materials) [hereinafter cited as Block Letter]. The Act was amended in 1985 to require annual reports. Food Security Act of 1985, Pub. L. No. 99-198, § 1255(a), 99 Stat. 1354, 1518.

21. 7 U.S.C. § 4209 (1982). The absence of a provision for judicial review in the FPPA began as a congressional reaction to the surge of citizen suits brought under environmental statutes, and as an attempt to limit judicial review to parties whom the Act directly affected. *See* 126 CONG. REC. 2262-63 (1980) (statement of Rep. Panetta). Representative Panetta's amendment to an early version of the FPPA, H.R. 2551, 96th Cong., 2d Sess. (1980), restricted judicial review to states and local units of government. 126 CONG. REC. 2263 (1980). The source of the subsequent, expanded provision to deny judicial review to state and local government interests directly affected by actions of federal agencies is unknown. The Food Security Act of 1985 amended the Act so as to authorize governors of states having a farmland protection policy or program to sue to enforce the compatibility provision of 7 U.S.C. § 4202 (1982). Pub. L. No. 99-198, § 1255(b), 99 Stat. 1354, 1518 (1985).

22. Both public and private opponents entreated the USDA. The Administration opposed the FPPA and attacked it primarily via federal agency disapproval of the USDA's rulemaking. In August 1982, response from other agencies to the USDA's draft regulations was so negative that the USDA began anew. *See* Block Letter, *supra* note 20, *reprinted in* Schnidman, *supra* note 20, app. XIV, at 242; *see also* Letter from David Stockman, Director, Office of Management and Budget, to Vice President George Bush (Aug. 30, 1982), *quoted in Oversight on USDA Soil and Water Conservation Programs: Hearing Before the Subcomm. on Soil and Water Conservation, Forestry, and the Environment of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 98th Cong., 1st Sess. 34 (1983) [hereinafter cited as *Conservation Programs Hearing*] ("[w]hile protection of agricultural lands is useful the Soil Conservation Service has many projects that provide benefits of more immediate need"); Memorandum from Food and Agriculture Cabinet Council, *reprinted in* 127 CONG. REC. E5658 (daily ed. Dec. 8, 1981) (the Department of Housing and Urban Welfare, after the NALS severely criticized it, *see supra* note 2, at 29-30, prevented release of prospective executive order calling for federal agencies to protect farmland).

Private, prodevelopment groups also have affected the FPPA's final rule. *See* Pacific Legal Foundation, *Comments on the Proposed Regulations of the United States Department of Agriculture for Implementation of the Farmland Protection Policy Act, 7 C.F.R. Part 658* (Sept. 30, 1983), *reprinted in* Schnidman, *supra* note 20, app. XIII, at 214. *Compare id.* at 221 ("USDA should not undertake to establish its own farmland regulatory scheme") *and id.* at 232 ("new criterion should be included for specific consideration of the economic viability of the farmland") *with* 49 Fed. Reg. 27,719 (1984) ("Act does not assign [USDA] the role of enforcement") *and id.* at 27,722 ("purpose of the Act is to protect the best of the Nation's farmlands which are located where farming can be a practicable economic activity").

The USDA candidly acknowledged that its final rule, published in July 1984, narrowed the scope and effect of the Act to a greater degree than had the proposed rule, which the agency published in July 1983.[23]

The most devastating provision of the final rule is section 658.3(c), which states in part:

> The Act and these regulations do not provide authority for the withholding of federal assistance to convert farmland to nonagricultural uses. In cases where either a private party or a nonfederal unit of government applies for federal assistance to convert farmland to a nonagricultural use, the federal agency should use the criteria set forth in this part to identify and take into account any adverse effects on farmland of the assistance requested and develop alternative actions that could avoid or mitigate such adverse effects. If, after consideration of the adverse effects and suggested alternatives, the applicant wants to proceed with the conversion, the federal agency may not, on the basis of the Act or these regulations, refuse to provide the requested assistance.[24]

Section 658.3(c) thus reduces the Act's procedures to meaningless paper shuffling when a private party or nonfederal governmental unit seeks federal assistance to convert farmland to nonagricultural land uses. The federal agency must gather information but must not use the information to refuse assistance. Congress surely could not have intended this absurd result.

To reach this position, the USDA gave an extraordinarily strained meaning to some terms of the Act and ignored others. The USDA found support for this position in the Act's declaration that it does not authorize "regulation" of land use or any federal action that would "affect" the "property rights" of landowners.[25] The USDA reasoned that "if a federal agency should deny assistance for a project on a certain tract solely on the basis that the site should be preserved for agricultural use, this denial would affect the use of private land and may not be consistent with local zoning or planning policy."[26] The USDA denied that a landowner has a "property right" to desired governmental financial assistance for a proposed land use or a right to have its land chosen as the site of a project; these are not congressionally created "entitlements," as the USDA conceded.[27] Nevertheless, the agency concluded that denying assistance would "constitute an interference with the use of private or nonfederal land."[28] In effect, the USDA seems to have relied upon the reasoning it had rejected.

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23. *Compare* 49 Fed. Reg. 27,716 (1984) (final rule) *with* 48 Fed. Reg. 31,863 (1983) (proposed rule).

24. 7 C.F.R. § 658.3(c) (1985).

25. 49 Fed. Reg. 27,716 (1984) (quoting 7 U.S.C. § 4208(a) (1982)).

26. *Id.*

27. *Id.* at 27,718.

28. *Id.*

The notion that a governmental decision to abstain from involvement in a project constitutes an "interference" is preposterous. Certainly the Act nowhere prohibits federal agencies from furthering the policies of the Act in a manner that "interferes" with land use by disappointing the owners' desires. Similarly, the Act does not mandate consistency with local zoning or planning; the Act's "consistency" is consistency with local and other programs "to protect farmland."[29] Moreover, because zoning typically merely permits, not mandates, specified land uses,[30] a governmental action denying financial aid for a land use which zoning permits would be consistent with zoning. In addition, zoning often allows farming to continue in areas zoned for other uses.[31]

Finally, the USDA relied upon the lack of "authority" in the Act for withholding federal assistance from projects which would convert farmland to nonagricultural uses.[32] Although the Act does not contain express authority, the authority is implicit. One of the Act's findings is that federal agencies "should take steps to assure" that federal actions do not cause undesirable conversion.[33] Another section directs federal agencies to take into account the adverse effects of their programs on conversion.[34] Still another section directs federal agencies to "develop proposals for action" that conform to the policies of the Act.[35] The clear import of these words is that federal agencies should do something more than merely collect and analyze information.

Several other aspects of the final rule also reduce the Act's effectiveness, although they are not as destructive as section 658.3(c). Despite the finding by Congress that the USDA is the agency "primarily responsible for the implementation of Federal policy with respect to United States farmland,"[36] the USDA, pointing to the absence of express statutory authority, declined to recognize in the final rule any responsibility to oversee compliance by other agencies or even to encourage them to protect farmland.[37] The USDA's denial of any advocacy role is a retrogression of policy. That agency has assumed such a role at least since 1976.[38]

The final rule minimizes in several ways the Act's applicability to

29. 7 U.S.C. § 4202(b) (1982).

30. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 55-56 (1975).

31. *Id.* § 56.

32. 49 Fed. Reg. 27,716, 27,718 (1984).

33. 7 U.S.C. § 4201(a)(7) (1982); *see also* 129 CONG. REC. S14,681 (daily ed. Oct. 26, 1983) (statement of Sen. Leahy: "intent of the farmland protection provisions is clear—to prevent the unnecessary conversion of prime agricultural lands to nonfarm uses due to actions of the Federal Government").

34. 7 U.S.C. § 4202(b) (1982).

35. *Id.* § 4203(b).

36. *Id.* § 4201(a)(6).

37. 49 Fed. Reg. 27,716, 27,718-19 (1984).

38. USDA Secretary's Memorandum 1827, Supp. 1, Statement on Prime Farmland, Range and Forest Land (June 21, 1976), *reprinted in* EPA, TECHNICAL ASSISTANCE DOCUMENT: REGIONAL APPROACHES TO PROTECTING ENVIRONMENTALLY SIGNIFICANT AGRICULTURAL LAND 4 (1981).

farmland near urban communities, although this farmland is typically under the most severe conversion pressures. The Act defined "prime farmland" to exclude "land already in or committed to urban development or water storage,"[39] but the final rule redefined "prime farmland" in a restrictive way. The rule's definition of "land already *in* . . . urban development" included "all such land with a density of 30 structures per 40 acre area."[40] This definition fails to take into account the kinds of structures or their location. The structures could be agricultural, or concentrated in a small corner of a forty-acre tract devoted largely to agriculture. The rule defined prime farmland *"committed* to urban development" as embracing land designated for specified nonagricultural uses in zoning or comprehensive land use plans of local governments.[41] Here, as elsewhere, the final rule mistakenly assumes that zoning and planning typically are mandatory and inflexible. Usually they are neither. A more realistic definition of land "committed to urban development" would include only land for which landowners had obtained the necessary land use development permits for urban uses. Finally, and perhaps most significantly, the final rule specified criteria for determining whether farmland was suitable for protection.[42] These site-assessment criteria discriminate against the protection of farmland near urban areas. The USDA candidly admits this fact and explains that "the purpose of the Act is to protect the best of the Nation's farmlands which are located where farming can be a practicable economic activity."[43] This explanation is an invention of a purpose not stated, or fairly implied, in the Act. It incorrectly attributes to Congress the absurd policy of protecting from conversion only those farmlands that have little or no need for protection.[44]

A major shift in USDA policy toward farmland retention has evidently occurred since 1975. At that time, then USDA Secretary Earl Butz declared that "[f]ederal projects that take prime land from production should be initiated only when this action is clearly in the public interest."[45] Furthermore, in 1978, the USDA's official position was that it would "intercede" in decisionmaking by other federal agencies if agency action "caused or enabled" conversion, or if the conversion "require[d] Federal licensing or approval."[46] Indeed, USDA policy for many years generally supported an active role by the USDA to retard

39. 7 U.S.C. § 4201(c)(1)(A) (1982).

40. 7 C.F.R. § 658.2(a) (1985) (emphasis added).

41. *Id.* (emphasis added).

42. *Id.* § 658.5.

43. 49 Fed. Reg. 27,716, 27,722 (1984).

44. FPPA sponsors had stressed that the urban fringe was one of the most critical areas experiencing cropland conversion. *See, e.g.*, 127 CONG. REC. E1564 (daily ed. Apr. 2, 1981) (Sen. Jeffords stating that unchecked urban development is dangerous to the United States); *id.* at S1181 (daily ed. Feb. 6, 1981) (Sen. Leahy stating that federal projects often foster land-consuming urban growth).

45. Butz, *Foreword* to USDA, PERSPECTIVES ON PRIME LANDS, *supra* note 1.

46. USDA, Secretary's Memorandum 1827, Revised, Statement on Land Use Policy (Oct. 30, 1978), *reprinted in Farmland Protection Act: Hearings Before Subcomm. on Environment, Soil Con-*

farmland conversion. This policy extended even into the administration of former Secretary John R. Block.[47]

In some respects, cropland retention efforts might have fared better had Congress not enacted the FPPA (as "implemented"). Before the FPPA's enactment, the conversion of prime farmland to nonagricultural uses was a major issue in the USDA's comprehensive conservation program under the Soil and Water Resources Conservation Act (RCA).[48] Since the passage of the FPPA, however, the USDA has virtually eliminated farmland protection from the RCA program.[49] The rationale behind the elimination is that "[t]he 1981 Farmland Protection Policy Act does not require [USDA] to deal with that issue in the context of RCA."[50]

IV. SUBSEQUENT DEVELOPMENTS

Several Senators in 1983 introduced a bill to amend the FPPA. The bill would have permitted judicial review, allowed public participation in agency decisionmaking, and required annual reports of the USDA's progress in implementing the Act.[51] The bill did not receive vigorous support, however, and its sponsors may have intended only to prod the

servation, and Forestry of the Senate Comm. on Agriculture, Nutrition, and Forestry, 96th Cong., 1st Sess. 13 (1979).

47. Secretary Block stated at a conference in 1981 that NALS had "built a strong case for establishing a national policy for protecting good agricultural land." Secretary John Block, Remarks at the National Agricultural Lands Conference (Feb. 10, 1981), *reprinted in* 127 CONG. REC. 2878 (1981); *see also Administration's Recommendations for a Comprehensive Soil and Water Conservation Act Program: Hearing Before the Senate Comm. on Agriculture, Nutrition and Forestry*, 97th Cong., 1st Sess. 10 (1981) (statement of Secretary of Agriculture John Block: "I think that the major role . . . from the Federal Government's position has to be one of taking some leadership").

48. 16 U.S.C. §§ 2001-2009 (1982). *See, e.g., Regional Soil and Water Conservation Needs: Hearings Before the Subcomm. on Soil and Water Conservation, Forestry, and Environment of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 98th Cong., 1st Sess. 83 (1983) (statement of Jackie Swigart, Secretary, Kentucky Department of Natural Resources and Environmental Protection) (Kentucky, from which about one-eighth of total national responses originated, listed farmland protection as high priority); *id.* at 284 (statement of Norma O'Leary, President, Connecticut Association of Conservation Districts) (most prevalent comment in nearly 900 responses from Connecticut to RCA Appraisal was that farmland protection should have top priority). *See generally* USDA, SOIL AND WATER RESOURCES CONSERVATION ACT: PROGRAM REPORT AND ENVIRONMENTAL IMPACT STATEMENT, Revised Draft 2-2, 3-1, 6-2 (1981) (conversion of prime farmland is major concern).

49. In response to a question why farmland protection was not an integral part of the RCA, the USDA responded that "[t]he RCA process could not settle [the] complicated legal, political, and social questions" involved in the issue. USDA, A NATIONAL PROGRAM FOR SOIL AND WATER CONSERVATION: 1982 FINAL PROGRAM REPORT AND ENVIRONMENTAL IMPACT STATEMENT 57 (1982) [hereinafter cited as 1982 FINAL PROGRAM REPORT].

50. *Conservation Programs Hearing, supra* note 22, at 32 (statement of John Crowell, Assistant Secretary of Agriculture for Natural Resources and Environment); *see also id.* (statement of John Block, Secretary of Agriculture: farmland protection is a separate issue from soil conservation programs). *But see* 1982 FINAL PROGRAM REPORT, *supra* note 49, at 55 ("USDA [has] recognized the need to examine all its conservation programs as part of the RCA effort and to integrate them into the national program").

51. S. 2004, 98th Cong., 1st Sess. (1983); *see* 129 CONG. REC. S14,676 (daily ed. Oct. 26, 1983).

USDA into promulgating its much-delayed rule.[52] After the USDA published its final rule, House sponsors of the FPPA charged that the rule had "absolutely perverted Congressional intent."[53] Despite these reactions, however, no serious congressional effort to obtain a viable farmland retention program has been mounted. Several explanations for the failure to rescue the program are possible. One of the most ardent supporters of an effective farmland retention program, Senator Jepsen of Iowa, lost his 1984 bid for re-election. Other supporters may have deemed the current political climate unfavorable and decided to wait for it to improve. Congress may have viewed other issues as more important. Even farmland retention advocates shifted their attention to bills protecting topsoil from destruction during development and halting erosion due to the cultivation of highly erodible lands.[54] The lack of widespread concern about future cropland shortages is not surprising during this era of overproduction of agricultural commodities and widespread foreclosures of farm mortgages. Possibly more significant than any of these explanations, however, was a rising tide of published opposition to the FPPA's basic premise that farmland conversion is a serious threat to national interests.

V. THE CRITICS AND THEIR CASE

The National Agricultural Lands Study sets forth the most authoritative case for farmland retention to date. Not surprisingly, the critics of a strong anti-conversion policy attacked the study severely. They pointed to the threshold problem of inadequacies in the data available to the NALS.[55] Although the NALS report readily acknowledged the problem,[56] the NALS necessarily relied upon data collected by others for disparate purposes, data which were not entirely suited to the NALS's mission. The critics also accused the NALS of misusing the available

52. Little, *Farmland Preservation: Playing Political Hardball*, 39 J. SOIL & WATER CONSERVATION 248, 249 (1984).

53. Letter from Congressmen Jim Jeffords & Ed Jones to John R. Block, Secretary of Agriculture (Oct. 5, 1984) (copy in authors' files).

54. HOUSE COMM. ON AGRICULTURE, REPORT ON FOOD SECURITY ACT OF 1985 (H.R. 2100), H.R. REP. NO. 271, pt. 1, 99th Cong., 1st Sess. 77-91 (1985) [hereinafter cited as REPORT ON FOOD SECURITY ACT OF 1985]. This committee refused to adopt an amendment offered by Rep. Jeffords to modify the FPPA "to specify that spending for Federal programs not contribute to the irreversible conversion of farmland to nonagricultural use, unless clearly demonstrated that there is no reasonable alternative to achieve the program objective" and to "allow States with adversely affected farmland protection programs to sue in Federal court for enforcement of the Act." *Id.* at 418; *see also* Cook, *Conservation and the 1985 Farm Bill: Round 1*, 39 J. SOIL & WATER CONSERVATION 179, 181 (1984).

As finally enacted, the Food Security Act of 1985 amended the FPPA in only two respects: (1) annual reports to Congress were required and (2) the FPPA requirement that federal programs be compatible with state, local, and private farmland protection programs was made enforceable by suits in federal district courts by governors of affected states. Pub. L. No. 99-198, § 1255, 99 Stat. 1354, 1518 (1985).

55. Raup, *supra* note 8, at 261, 264.

56. NALS, *supra* note 2, at 13, 15.

data. They charged that the NALS had mistakenly equated "rural" land, which includes much nonfarm land such as forests, with the narrower category of "agricultural" land; thus, the NALS figures on conversion of agricultural land were exaggerated.[57] Making this point, Professor Philip M. Raup, Department of Agricultural and Applied Economics at the University of Minnesota, concluded:

> The United States is not losing 3 million acres of farmland a year. An average of 1,694,771 acres or 58% of the total annual conversion came from forest or other (i.e., nonfarm) land, 18.5% from pasture or range, and 23.4% from cropland. The demand for shocking statistics has led to a serious misuse of NALS data, a misuse that has been fostered by the confusing way in which the data have been presented.[58]

Professor Raup also criticized the study in several other respects. The NALS predicted that "between 84 and 143 million additional acres would need to be planted in principal crops by 2000 to meet the projected volume of demand at constant real prices."[59] Raup faulted this prediction on the ground that it unrealistically assumed constant real prices.[60] Raup viewed the NALS's attempt to forecast demand for exports of agricultural crops—a large part of the total projected demand—as hazardous, if not futile. He pointed out that the mix of crops exported over time varies, and that some crops require more land than others. These facts compound the difficulty of projecting export demand.[61] The most fundamental charge made by Raup was that the NALS failed "to confront a basic assumption . . . that we are working with a finite stock of land resources . . . . In a figurative but very real sense, we produce land in laboratories."[62] Raup even claimed that the study was undertaken primarily in response to concerns about urban sprawl rather than sufficiency of cropland.[63]

Another severe critic of the NALS was William A. Fischel, Associate Professor of Economics at Dartmouth College.[64] He too challenged the data and methodology upon which the NALS relied. His central points, however, were that the private market will "normally" allocate

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57. Raup, *supra* note 8, at 266-67.
58. *Id.* at 267.
59. NALS, *supra* note 2, at 43.
60. Raup, *supra* note 8, at 264.
61. *Id.* at 269-70.
62. *Id.* at 271-72.
63. *Id.* at 261. Raup stated:

> The adequacy of U.S. agricultural lands to perform a role as residual supplier of food to a hungry world . . . was not the source of the initial support that culminated in the decision to conduct the study. Urban sprawl and environmental concerns provided the bedrock; world food supply concerns were added as superstructure.
>
> The NALS was the product of the frustration many environmentalists felt at the evasive way in which their desire to retard urban sprawl was being treated by political leaders. The NALS, in one sense, was a bone thrown to keep the barking dogs quiet.

Id.

64. *See* Fischel, *supra* note 8.

agricultural land to its best use[65] and that the NALS's policy recommendations have a "serious potential to cause economic mischief by enabling parochial interests to restrict new housing and other developments for reasons unrelated to their true social costs."[66]

Other commentators with high academic or professional credentials have expressed similar views. The titles of two collections of essays perhaps indicate a trend. *The Cropland Crisis, Myth or Reality?*,[67] published in 1982 by Resources for the Future, was followed by *The Vanishing Farmland Crisis*.[68] An analysis of the issue, published by the Urban Land Institute, concluded that governmental efforts to retard cropland conversion are unnecessary and may create harm by increasing the cost of housing.[69] President Reagan's Commission on Housing concurred and recommended repeal of the FPPA.[70] After the USDA promulgated its final rule, however, opponents may have regarded repeal of the FPPA as unnecessary.

VI. SHAPING FUTURE NATIONAL POLICY

If the apparently devastating criticisms of the NALS are correct, and they do seem persuasive, then the study does not conclusively demonstrate that a future shortage of cropland in this nation will occur, or even is likely to occur. Therefore, one might conclude that the problem deserves no further attention. But such a conclusion would be imprudent. A persuasive case has not been made, and probably could not be made, that the cropland shortage problem is fictitious, and the consequences would be calamitous if a shortage did occur. The risk, even if minimal, should not be ignored.

The first logical step in a fresh attempt to shape national policy on this subject would be to recognize that each generation has an ethical obligation to future generations—an obligation to use cropland in ways that do not unreasonably diminish opportunities of future generations to satisfy their needs for food and fiber. This general notion seems to have widespread agreement, although many commentators and analysts have debated, and continue to debate, how to formulate the intergenerational

65. *Id.* at 247-56.

66. *Id.* at 238; *see also id.* at 256-58 (suggesting that real beneficiaries of the NALS are local antidevelopment interests).

67. THE CROPLAND CRISIS: MYTH OR REALITY? (P. Crosson ed. 1982) [hereinafter cited as CROPLAND CRISIS]. The contributors have varied viewpoints. Although some of them are sympathetic to cropland retention programs, most generally answer that the cropland crisis is myth.

68. THE VANISHING FARMLAND CRISIS (J. Baden ed. 1984) [hereinafter cited as VANISHING FARMLAND]. One contributor, Julian L. Simon, Professor of Economics and Business Administration at the University of Illinois, declared in his essay that "[m]ost agricultural economists think that the loss of prime farmland is not a national problem." Simon, *Some False Notions About Farmland Preservation*, in VANISHING FARMLAND, *supra*, at 59, 74.

69. *The Agricultural Land Preservation Issue: Recommendations for Balancing Urban and Agricultural Land Needs*, URB. LAND, July, 1982, at 18.

70. THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 195, 196 (1982).

ethical obligation and apply it to particular resources.[71] Congress already has recognized expressly, in the National Environmental Policy Act, that each generation has responsibilities "as trustee of the environment for succeeding generations . . . ."[72] The twenty-year time frame of the NALS precluded consideration of the full dimensions of the problem.

Efforts to obtain accurate data on the size and quality of the cropland base in the nation should continue. At the same time, we must realize that in an important sense the cropland base is not finite. The capacity of cropland to satisfy future needs for food and fiber is vastly more significant than the number of acres of such land.

The future capacity of farmland will be determined largely by scientific and technological progress in increasing crop yields. Observers cannot predict productivity far into the future. Although some observers have discerned reduced rates of increase in crop yields,[73] no one can predict what future rates will be. Other factors may reduce crop yields in uncertain amounts; these factors include soil erosion, climatic changes, pollution, water scarcity, energy costs, and the emergence of weeds and insects resistant to control. Thus, a meaningful quantification of the nation's cropland base is exceedingly difficult to formulate. To give up the task as impossible, however, would be foolhardy. Alternative predictions based upon varying assumptions are feasible. It would be equally foolhardy to blindly assume, as some have done,[74] that somehow the resource base for future food and fibre will be adequate for future needs, either by ever-increasing crop yields or by some other form of resource substitution. The fact that such substitutions often have occurred in the past is no assurance that they will occur in the future as to cropland.[75]

The prediction of future demands for American agricultural crops is even more obviously fraught with uncertainty than ascertaining the cropland base. Wide swings in the volume of farm crop exports have occurred recently and no doubt will occur in the future. As in the case of

71. The relevant literature is discussed in Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984).

72. 42 U.S.C. § 4331(b)(1) (1982).

73. "I have a feeling that the technological revolution that has shaped agriculture since World War II may be ending." Former Secretary of Agriculture Bob Bergland in FARMING THE LORD'S LAND: CHRISTIAN PERSPECTIVES ON AMERICAN AGRICULTURE 8 (C. Lutz ed. 1980); *see also* Heady, *The Adequacy of Agricultural Land: A Demand-Supply Perspective*, in CROPLAND CRISIS, *supra* note 67, at 23, 34 (suggesting that crop yields will be difficult to increase in the future).

74. This assumption is explicit or implicit in most, if not all of the writings of economists opposed to cropland retention programs. *See, e.g.*, Raup, *supra* note 8, at 271-72.

75. Aside from the impossibility of predicting the course of future technological development, observers should consider the unique quality of some land for certain specialty crops. Richard E. Rominger, Director of the California Department of Food and Agriculture, stated that "all U.S. production of [Tokay grapes] is located within a radius of 9 miles of the center of Lodi [, California]" and if that city continues to grow, "there will no longer be any Tokay grapes to sell." *Sustainable Agricultural Systems: Hearings Before the Subcomm. on Department Operations, Research, and Foreign Agriculture, of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 16-17 (1982) [hereinafter cited as *Agricultural Hearings*].

cropland resource capacity, however, projections based upon alternative, realistic scenarios are possible. Our national interest clearly requires that we be able to meet future export demands for our farm products, even if they are not certain to occur.

Projections of cropland supply and demand must account for the effects of how private markets for land operate. If and when land becomes less valuable for other uses than for growing crops, conversion theoretically should stop and reconversion should occur.[76] The problem thus would be self-correcting and never reach crisis proportions. This scenario assumes, however, that private land markets will function well and that reconversions are feasible. Both assumptions, especially the latter, are suspect.[77] After developers have broken farms into urban lots, upon which they have constructed buildings, streets, utility lines, and other things at considerable cost, the cost of returning this land to viable farming would be staggering. Only an extraordinary food scarcity crisis would justify expenditures of that magnitude. Nor can we place much weight on Professor Fischel's suggestion, advanced as not "too whimsical," that growing crops in yards of residences could alleviate future food shortages.[78]

Assuming that a case can be made for some kind of cropland retention program, society must consider the effects of such a program upon alternative land uses. As already mentioned, fear that the resulting programs would unreasonably increase the costs of land for other uses, especially housing, has caused many commentators to oppose the development of an effective national policy of cropland retention.[79] It will indeed be difficult to guess the magnitude of the cost increases that will likely result from cropland retention programs. Because a variety of imprecise factors determine land prices, predictions of cost increases due to cropland retention may be as slippery as predictions of cropland supply and demand. One important factor is the stringency of the particular cropland retention program. Another factor is the availability in the community of land suitable for noncropland uses, but not suitable for cropland. Many worthwhile cropland retention programs could have no significant effect upon prices of land for other uses.

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76. Fischel, *supra* note 8, at 247-56.

77. *See* Harriss, *Free Market Allocation of Land Resources: (What the Free Market Can and Cannot Do in Land Policy)*, in THE FARM AND THE CITY: RIVALS OR ALLIES? 123, 128-30 (A. Woodruff ed. 1980). Some commentators believe that the actual effects of the land market upon cropland availability are unknown:

> Although we have reasonably good estimates of land physically suited for cropland production, estimates of the acreage which would be brought into production and investment and operating capital requirements at varying levels of price for agricultural commodities are not available nationally. Nor do we have adequate knowledge of the effects of conversion to crops of land now in pasture, forest, and range on the economic supply of land in these areas.

Agricultural Hearings, *supra* note 75, at 67, 69 (statement of Kenneth R. Farrell, Director, Food & Agricultural Policy Program, Resources for the Future).

78. Fischel, *supra* note 8, at 249.

79. *See supra* text accompanying notes 69-70.

Even if such price effects did occur, society must balance them against both the benefits of having a cropland reserve and the environmental costs of attempts to obtain greater productivity from existing and potential cropland. Among the environmental costs are the erosion of highly erodible lands pressed into cultivation, the pollution of air and water from increasing application of fertilizers and pesticides, and the filling of wetlands.[80] The task of ascertaining the relative costs of converting or retaining cropland is formidable and cannot be done with precision. Society should remember that both alternatives have their costs; the costs of a cropland retention program are not necessarily greater than the costs of not having such a program.

VII. CONCLUSION

The proper conclusion from this analysis is that the government could justify a more aggressive national program of cropland protection than currently exists. The least that should be done is to seek to achieve the general goal of the FPPA, which was merely to avoid action by federal agencies that cause undesirable conversions. Such a program is essentially cost-free, is not regulatory, and does not interfere with the private land market.

To accomplish that modest goal, Congress must amend the FPPA to remove the hobbles imposed by the USDA final rule and the Act itself. The amended Act should authorize and require federal agencies to deny financial assistance for improper conversions. Administrative oversight and judicial review should ensure agency compliance. Congress should assign an advocacy role to the USDA or some other agency.

The next question involves the national policy on cropland retention programs of local governments, states, and private organizations. The present policy enunciated in the FPPA is blind (albeit tepid) support of those programs, without any attempt to supervise or even scrutinize them.[81] The FPPA assumes that such nonfederal programs promote national interests; a probe of the assumption's validity is overdue.

Programs of state and local governments which purport to protect farmland from conversion to other uses have taken several forms. These programs include agricultural zoning (exclusive and nonexclusive), governmental purchase of development rights, transfer of development rights, preferential assessment of farmland for ad valorem taxation, the so-called "right-to-farm" statutes, and other measures.[82] In some re-

80. One author laments the growing destruction of the traditional English country landscape by conversion to cropland. M. SHOARD, THE THEFT OF THE COUNTRYSIDE (1980). Of course, effective protection of sensitive land may thwart pressures to convert such land to cropland. Support was strong for the "sodbusting" and "swampbusting" provisions of the 1985 farm bill. REPORT ON FOOD SECURITY ACT OF 1985, *supra* note 54, at 77-89. Some rigorous cropland retention programs could divert housing and other urban uses to hills and swamps but such a result is speculative.

81. *See supra* text accompanying note 12.

82. *See* references cited *supra* note 13.

gions, state and local governments have pursued such programs vigorously. Apparently, the current prevailing national sentiment is that resort to land use controls to retard cropland conversion is appropriate, if at all, at the local and state governmental levels but not at the national level. For two reasons, however, serious doubt exists that state and local programs will protect adequately the national interest in an assured supply of food and fiber for the future. First, the dominant purposes of state and local farmland retention programs differ from the national purpose. State and local goals include the management of urban growth, the continuation of existing farming enterprises, and the preservation of rural environments for aesthetic, recreation, and wildlife protection purposes. The conservation of cropland occurs incidentally, if at all. For example, right-to-farm statutes typically protect livestock feedlots, as well as cropland, from nuisance litigation.[83] Moreover, preferential ad valorem taxation is viewed as an ineffective and undesirable means of retaining farmland.[84] Second, the programs offer no assurance that croplands saved incidentally by diverse programs in some communities will meet, without national direction, future national needs as to the quantity, quality, and location of croplands.

Private nonprofit organizations, notably the American Farmland Trust, have made some efforts to retain cropland by private programs. These organizations often acquire development rights and other interests in prime farmland.[85] Although this device has conserved some farmland, vastly more widespread use of the device is necessary before private acquisition programs can become a major factor in cropland retention schemes.

Private programs also may not further the national interest. Like programs of local and state governments, private programs may serve purposes other than maintaining cropland capacity. Moreover, the private entities are not accountable to the public; indeed, they may be accountable to no one.[86] The devices used by private organizations to restrict the use of land also may be insufficiently flexible to allow adjustment to changing conditions.[87] A wise national policy would withhold approval of private farmland programs until investigation shows that the programs further the national interest.[88]

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83. *See, e.g.*, TEX. AGRIC. CODE ANN. §§ 251.001-.005 (Vernon 1982). *See generally* Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289 (1984).

84. Yudof, *The Ad Valorem Property Tax and Productivity Values for Farm and Ranch Land: A Legal Policy in Search of Justification*, 3 URB. L. REV. 88 (1979).

85. J. JUERGENSMEYER & J. WADLEY, *supra* note 13, § 4.16; Micek & Weubbe, *The California Farmland Trust: The Proposal to Balance the Rural and Urban Land Use Needs of Californians*, 18 U.S.F.L. REV. 171, 187 & n.73 (1984).

86. *See* Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 460-61 (1984).

87. *Id.* at 461-63.

88. For a discussion of the extent to which the Internal Revenue Code provides incentives for transfers of interests in farmland to farmland trusts (and other entities), see Thompson, *supra* note

Finally, Congress should direct attention to bringing the national cropland retention policy into line with related national policies. The Food Security Act of 1985 contains tough provisions to protect topsoil from erosion due to "sodbusting"—the cultivation of highly erodible soils.[89] Farmers who cultivate such lands would lose price supports, crop insurance protection, loans, and other benefits for all of their crops. Congress also has authorized financial incentives to states to institute and administer programs to remove highly erodible lands from cultivation and to encourage soil conservation practices.[90] This strong policy contrasts sharply with the weak cropland retention policy at the national level. This disparity lacks a rational basis.[91] The loss of cropland by conversion to other uses and the loss of topsoil by erosion are merely different aspects of a single problem—the possibility that the capacity of land in the United States will be inadequate to meet future needs for food and fiber.

13. A proposed Treasury Department regulation appears to undermine the idea that transfers of development rights in farmland to farmland trusts would constitute a "qualified conservation contribution" entitled to an income tax deduction under § 170(h) of the Internal Revenue Code. 43 Fed. Reg. 29,940 (1983) (to be codified as Treas. Reg. § 1.170A-13); *see also* Warfield v. Commissioner, TAX CT. REP. (CCH) 41,869(M), at 73,132 (Feb. 7, 1985) (rejecting taxpayer's contention that the FPPA precluded application of the alternative minimum tax to capital gains from a transfer of farmland development rights to the Maryland Agricultural Land Preservation Foundation).

89. Pub. L. No. 99-198, §§ 1201-1213, 99 Stat. 1354, 1504-07 (1985).

90. *Id.* §§ 1231-1236, at 1509-14.

91. Perhaps one can explain this inconsistency on the ground that the cause of soil conservation remains untainted by association with currently unpopular national land use control.