

RULE PROPOSALS

INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

AGRICULTURE

(a)

STATE AGRICULTURE DEVELOPMENT COMMITTEE

Notice of Proposed Substantial Changes Upon Adoption to Proposed New Rules State Agriculture Development Committee Rules Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards

Proposed Changes: N.J.A.C. 2:76-25.3 through 25.8, 25.10, 25.12, 25A.2, 25A.3, 25A.7, and 25A.8

Proposed: August 7, 2023, at 55 N.J.R. 1573(a).

Authorized By: State Agriculture Development Committee, Susan E. Payne, Executive Director.

Authority: N.J.S.A. 4:1C-31.2.

Submit written comments by September 13, 2024, to:

Charles Roohr, Deputy Executive Director
State Agriculture Development Committee
PO Box 330
Trenton, New Jersey 08625-0330
sadc@ag.nj.gov

Take notice that the State Agriculture Development Committee (“SADC” or “Committee”) proposed new rules at N.J.A.C. 2:76-25 and 25A on August 7, 2023, at 55 N.J.R. 1573(a). The public comment period on the original notice of proposal included a public hearing held on September 27, 2023, generating recommendations by the SADC Executive Director at a public meeting of the Committee on September 28, 2023. The public comment period was extended to February 23, 2024, to accommodate the annual meeting of the New Jersey State Agricultural Convention. The majority of the public comments expressed concern about the treatment of existing disturbances pursuant to the new rules on existing preserved farms and the process by which waivers from soil disturbance limits could be obtained.

The SADC is proposing a number of substantial changes to the proposed new rules in response to the above-noted comments. A summary of the comments that prompted changes, and the agency response to those, is provided below. This notice of proposed substantial changes upon adoption is published pursuant to N.J.S.A. 52:14B-4.10.

Comments were received from the following individuals and entities:

1. Kurt Alstede, Alstede Farms, LLC
2. Atlantic County Board of Agriculture
3. David Barclay
4. Bergen County Board of Agriculture

5. David Betts
6. Cathy Blumig
7. Michael Brooks
8. Robin Bruins
9. Pat Butch
10. Cape May County Board of Agriculture
11. Allen Carter, New Jersey Farm Bureau
12. County agriculture development boards of: Atlantic, Cape May, Cumberland, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Salem, Somerset and Sussex
13. Cumberland County Board of Agriculture
14. Scott Daum, Four Seasons Nursery
15. Keith Dickinson
16. Ann Dorsett
17. Jerry Eutrell
18. Gloucester County Board of Agriculture
19. Lewis Goldshore, Esq.
20. Bill Green
21. Elise Haring and Lucas Haring
22. John Hart
23. Julia Herr
24. Scott Hofsaess
25. William Horner, Esq.
26. Hunterdon County Board of Agriculture
27. Rodger Jany
28. Steve Jany, Chairman, West Windsor Agriculture Advisory Committee
29. Ross Johnson
30. Brian Jones and Judy Jones, Beekman Nursery
31. Tara Kenyon, Franklin Township Agricultural Advisory Committee and Franklin Township Open Space Advisory Committee
32. Jon Knox
33. Jennifer LaMonaca, President; Brandon Rasso, Vice President, Edward Gaines, Treasurer, Atlantic County Board of Agriculture
34. George Lucas, Lucas Greenhouses
35. Keith MacIndoe
36. Steven Makarevich, Farm Credit East
37. R. Gregory Manners
38. Gregory Matthews
39. William McCormack and Leah McCormack
40. Mercer County Board of Agriculture
41. Robert Merenich, Esq.
42. Middlesex County Board of Agriculture
43. Monmouth County Board of Agriculture
44. Morris County Board of Agriculture
45. Aimee Myers and Doug Myers
46. Steven Oroho, Senator, Legislative District 24
47. Ed Overdevest

- 48. Passaic County Board of Agriculture
- 49. Phil Rochelle and Susan Rochelle
- 50. Gregory Scibilia
- 51. Michael Seery and Brenda Seery
- 52. Somerset County Board of Agriculture
- 53. Parker Space, Assemblyman, Legislative District 24
- 54. Anthony Sposaro, Esq.
- 55. Ryck Suydam
- 56. Judith Tucker and Peter Tucker
- 57. Pierre Van Mater, III
- 58. Nicole Voigt, Esq.
- 59. Tim Von Thun and Bob Von Thun
- 60. Warren County Board of Agriculture
- 61. Harold Wirths, Assemblyman, Legislative District 24

General Comments

1. COMMENT: Commenters stated that the originally proposed rules should not apply to a farmland preservation deed of easement (DOE) executed prior to the adoption of the rules because landowners didn't understand at the time they entered the farmland preservation program that soil disturbance would be subject to regulation. (1 through 24, 26 through 34, 36 through 46, and 48 through 61)

2. COMMENT: The originally proposed regulations elicited comments that soil disturbance existing at the time the farm was preserved should not count toward the soil disturbance limit of 12 percent or four acres, whichever is greater, of the farm property, as set forth in the originally proposed rules, and that the limit should only count for disturbance occurring after the rules are adopted. (13, 14, 35, and 52)

RESPONSE TO COMMENTS 1 AND 2: The SADC disagrees that the proposed rules are retroactive. Rather, the soil protection rules clarify the regulatory soil disturbance limitation pursuant to the Agriculture Retention and Development Act (ARDA), N.J.S.A. 4:1C-11 et seq., and the implementing rules at N.J.A.C. 2:76 that have existed since the inception of the State's farmland preservation program and that are now set forth at N.J.A.C. 2:76-6.15(a)7.

In 1983, ARDA established the farmland preservation program and required the SADC to "adopt rules and regulations necessary to carry out the purposes of" the law. N.J.S.A. 4:1C-31.2. As the New Jersey Supreme Court stated in *State Agriculture Development Committee v. Quaker Valley Farms, LLC*, 235 N.J. 37 (2018), "[t]he preservation of high quality soil and open space for future generations is one of the chief aims of the Farmland Preservation Program." *Id.* at 41.

ARDA defines "development easement" at N.J.S.A. 4:1C-13.f as "an interest in land, less than fee simple absolute title thereto, which enables the owner to develop the land for any nonagricultural purpose as determined by the provisions of this act and any relevant rules or regulations promulgated pursuant thereto." "Agricultural deed restrictions for farmland preservation purposes" at N.J.S.A. 4:1C-13.n is defined as a "statement containing the conditions of the conveyance and the terms of the restrictions set forth in [ARDA] and as additionally determined by the [SADC] on the use and development of the land which shall be recorded with the deed in the same manner as originally recorded." N.J.S.A. 4:1C-32.b further provides that "[u]pon the purchase of a development easement ... the landowner shall cause a statement containing the conditions of the conveyance and the terms of the restrictions on the use and development of the land to be attached to and recorded with the deed of the land, in the same manner as the deed was originally recorded."

In order to effectuate ARDA's statutory requirement that restrictions be recorded on the use and development of preserved farmland, the SADC proposed in July 1984 (16 N.J.R. 1639) and adopted in September 1984 (16 N.J.R. 2427) rules that, among other things, established restrictions at N.J.A.C. 2:76-6.15 incorporated in the deeds of easement. One of the restrictions existing since September 1984 to the present in substantially identical form aside from changes in its numerical order in the deed and for conformance "to plain language standards ... to help clarify the intent of each deed restriction which ultimately reduces the possibility of misinterpreting the restrictions" (see "Summary" at 18 N.J.R. 513), is currently at N.J.A.C. 2:76-6.15(a)7 (Paragraph 7):

No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation,

erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.

In *Quaker Valley*, the Supreme Court noted that Paragraph 7 must be read together and balanced with other provisions in the deed of easement. Preserved farm landowners are "permitted to construct, improve or reconstruct any roadway necessary to service crops, bogs, agricultural buildings or reservoirs as may be necessary" (N.J.A.C. 2:76-6.15(a)12) and "may construct any new buildings for agricultural purposes" (N.J.A.C. 2:76-6.15(a)14). *Id.* at 58. The Court agreed with the SADC that all deed provisions must be interpreted in their entirety, but stated that clarification of Paragraph 7 through rulemaking was necessary not only to provide preserved farm landowners with "adequate direction on the tangible constraints on their agricultural use of the land," but also because:

[i]f the SADC fails to undertake the necessary rulemaking to establish guidance on the extent of soil disturbance that is permissible on preserved farms, then it can expect administrative due process challenges to its enforcement actions. *Id.* at 63-64.

The SADC's promulgation of soil protection regulations responds to the Supreme Court's direction to clarify Paragraph 7, a regulatory deed restriction in existence and applicable to all preserved farm landowners since 1984. The court instructed the SADC that the failure to do so would jeopardize the agency's ability to successfully enforce violations of Paragraph 7 against current and future preserved farm landowners.

Although the proposed soil protection rules are not retroactive, the SADC is sensitive to the claim made by commenters in response to the originally proposed rules that landowners may not have anticipated at the time they signed the deed of easement that soil disturbance would be regulated. In addition, the SADC has carefully considered the related comment that soil disturbance existing at the time the rule is adopted not count toward the 12 percent/four acre limit and that those limits should only count for soil disturbance occurring after rule adoption. The SADC is now proposing substantial changes allowing for soil disturbance of up to 12 percent/four acres, whichever is greater, on the farm property.

N.J.A.C. 2:76-25.5 has been revised to provide, at new subsection (c), that the total soil disturbance limit on farms preserved prior to October 1, 2024, is equal to the sum of the farm's preexisting soil disturbance plus 12 percent or four acres, whichever is greater. For farms preserved after October 1, 2024, new subsection (d) states that the total limit of soil disturbance is equal to 12 percent or four acres, whichever is greater. October 1, 2024 is the approximate date the Committee will authorize adoption of the soil protection rules.

3. COMMENT: Commenters stated that the process set forth in the originally proposed rule to obtain waivers from the soil disturbance limit was too complicated and that the process lacked a mechanism for the SADC to consult with outside agencies and experts. (2, 9, 11, 19, 20, 43, 47, 54, and 58)

RESPONSE: The originally proposed rule included two types of waivers, a production waiver allowing for a maximum soil disturbance limit of up to 15 percent or six acres, whichever is greater, of the farm property primarily intended to provide relief to preserved farm landowner whose properties were at or near the 12 percent/four acre limit; and an innovation waiver allowing for no limit on additional agricultural activities, provided the SADC determined that the activity subject to the innovation waiver did not negatively impact the farm's soil and water resources. Both waivers entailed a detailed review and approval process, including the implementation of a stewardship conservation plan and notice to neighboring properties. In addition, the production waiver required compliance with defined construction standards.

The production waiver and associated construction standards are now unnecessary in light of the proposed substantial change for farms enrolled in the program by October 1, 2024, which will allow for 12 percent or four acres, whichever is greater, on the farm property, in addition to preexisting soil disturbance mapped on the farm as of Spring 2023.

The SADC also recognized that use of "waiver" to modify "innovation" may have resulted in the conclusion that the innovative agricultural practice constituted soil disturbance. The rule has been substantially changed to delete "waiver" and more accurately describe the agricultural practice as an "innovative agricultural practice." Substantial

changes are proposed to make the review and approval process more streamlined and for the process to be less burdensome on applicants. In addition, substantial changes are proposed by listing other agencies with which the SADC can consult when evaluating the innovative practice, and deleting certain advance notice requirements as cumbersome and inappropriate.

Proposed substantial changes at N.J.A.C. 2:76-25.6(a) eliminate production waivers and instead allow for approval of an innovative agricultural practice that does not count as soil disturbance and is not otherwise an exempt agricultural practice listed at N.J.A.C. 2:76-25.4. To be eligible for approval of an innovative agricultural practice, the applicant must demonstrate to the easement holder and the SADC that it is infeasible to utilize areas of existing soil disturbance sufficient to accommodate the innovative practice (proposed N.J.A.C. 2:76-25.6(c)2; recodified herein as N.J.A.C. 2:76-25.6(c)1, and changing “use” to “agricultural practice”). The proposed substantial changes eliminate the need for the applicant to: show that there is no apparent feasible alternative to the project resulting in soil disturbance (originally proposed at N.J.A.C. 2:76-25.6(c)1); obtain a stewardship conservation plan, a forest stewardship plan, and a long term maintenance plan for the conservation plan (originally proposed at N.J.A.C. 2:76-25.6(c)4, 5, and 6, respectively); and demonstrate compliance with design and construction criteria (originally proposed at N.J.A.C. 2:76-25.6(d)1 and 2).

Originally proposed N.J.A.C. 2:76-25.6(g)1, 2, and 3, providing for notice of the waiver application to the clerk and land use board of the municipality in which the farm is located, to property owners within 200 feet of the farm property, and to the county planning board, have been deleted, as has subsection (h), containing the contents of the notice, in response to comments about the complexity of the waiver process in the originally proposed rules. The SADC anticipates that the removal of the stewardship conservation plan requirements and notice provisions will make the process of obtaining approval for an innovative agricultural practice less burdensome for landowners and grantees.

Recodified N.J.A.C. 2:76-25.6(g), originally proposed at N.J.A.C. 2:76-25.6(j) now provides, at new paragraph (g)3 and in response to comments, that in considering the proposed innovative agricultural practice, the SADC may consult with the New Jersey Department of Agriculture; the New Jersey Agricultural Experiment Station and appropriate county agents; county agriculture development boards; the State Soil Conservation Committee; any other state departments of agriculture, land grant institutions, or agricultural experiment stations; the United States Department of Agriculture or any other Federal governmental entity; or any other organization or person that may provide expertise concerning the particular practice.

4. COMMENT: Commenters observed that the proposed soil protection rules did not specifically address the agricultural practice known as “ball and burlap” harvesting, a technique in which a tree or shrub is prepared for transplant. The commenters suggested that the proposed rules recognize that “ball and burlap” harvesting will not constitute improper soil removal. (25 and 35)

RESPONSE: The SADC agrees with the comments. “Dug nursery stock” has been added as an example of an exception at recodified N.J.A.C. 2:76-25.5(j) (originally proposed at N.J.A.C. 2:76-25.5(g)) providing that removal of topsoil is prohibited except if incidental to the harvesting of agricultural or horticultural products.

Summary of Agency-Initiated Changes:

The SADC is proposing substantial changes not requested in the public comments submitted on the originally proposed rulemaking, but necessary to properly effectuate the administration of the soil disturbance rules. These agency-initiated substantial changes propose the deletion of unnecessary, or the adding of needed, definitions; adding and deleting words and provisions, where necessary or appropriate; and reorganizing and clarifying certain parts of the originally proposed rules.

N.J.A.C. 2:76-25.3

“Allocated soil disturbance” is proposed as a new definition to mean soil disturbance of 12 percent or four acres, whichever is greater, on the premises, and in order to differentiate the 12 percent or four acre disturbance limit from any preexisting soil disturbance on premises

preserved prior to October 1, 2024. The new definition is needed as a result of the proposed substantial changes at N.J.A.C. 2:76-25.5.

“Baseline soil disturbance map,” meaning a map generated by the Committee using the “image of record” (described below) reflecting the extent and location of soil disturbance on a premises, is a proposed new definition needed in connection with differentiating between maps provided to preserved farm landowners and those provided to prospective preserved farm landowners with notice of the extent of soil disturbance occurring on the premises. This new definition is required due to substantial changes at N.J.A.C. 2:76-25.5 and 25.10.

“Contiguous premises” has been revised by replacing “properties” with “premises” for consistency with how the rules address the distribution of allocated soil disturbance when a division of premises is approved.

“Divided premises” is proposed as a new definition to address those instances when the allocated soil disturbance is distributed after a division of the originally preserved premises into two or more preserved properties.

The definitions of “existing agricultural water impoundment” and “existing open ditch” in the originally proposed rule have been revised. The word “existing” in both definitions has been revised to clarify that those features, if “preexisting” on the farm as reflected on the Nearmap Spring 2023 Vertical Imagery, will not be counted as soil disturbance for all farms, whether already preserved or preserved in the future. The description of the image in both definitions is now more accurately described as “the Nearmap Spring 2023 Vertical Imagery,” replacing the term “baseline map.” The phrase “established pursuant to N.J.A.C. 2:76-25.10” in the originally proposed rule has been deleted as unnecessary. For grammatical purposes, the period and the word “and” after the regulatory cite in the “open ditch” definition have been deleted, with a new sentence beginning with “A preexisting open ditch” before the words “may be” and the terms have been alphabetically relocated.

The definitions of “forest land” and “forest stewardship plan” in the originally proposed rule have been eliminated as unnecessary because the requirement of a stewardship conservation plan in the originally proposed N.J.A.C. 2:76-25.6(c)5 has been deleted.

The definition of “hoophouse” in the original rule proposal has been revised by deleting “and does not have a permanent foundation, footings, ground-level surface, or anchoring system” to preclude an interpretation that the entire area of a hoophouse constitutes soil disturbance if it is secured permanently in the ground, and because surfacing is already addressed in the exemption for hoophouses at N.J.A.C. 2:76-25.4(a)6.

“Image of record” is proposed as a new definition, resulting from revisions at N.J.A.C. 2:76-25.10. N.J.A.C. 2:76-25.10 provides for notice to preserved farm landowners in the form of a map of soil disturbance. The definition is intended to distinguish between the aerial photography used as a basis for the maps of farms that were preserved prior to, and as a basis for the maps of farms that are preserved after, October 1, 2024. For farms preserved before October 1, 2024, the image of record is the Nearmap Spring 2023 Vertical Imagery; for those farms preserved after October 1, 2024, the image of record is the most current aerial imagery available, as determined by the Committee. October 1, 2024 is the approximate date the Committee will authorize adoption of the soil protection rules.

“Innovative agricultural practice” is proposed to replace the term “innovation waiver” to correct any misinterpretation of the originally proposed rule and the SADC’s understanding that use of the word “waiver” to modify “innovation” may have resulted in the conclusion that the innovative agricultural practice constituted soil disturbance. The definition provides that an innovative agricultural practice is not otherwise listed in the exempt practices at N.J.A.C. 2:76-25.4, and that an approved innovative practice will not count as soil disturbance pursuant to N.J.A.C. 2:76-25.5.

The originally proposed definition of “limit of disturbance” is deleted because it pertained to the production waiver process eliminated in the revisions at N.J.A.C. 2:76-25.6.

The definition of “premises” in the originally proposed rules has been revised to clarify that the word includes either an original premises or a divided premises.

“Original premises” is a new definition needed for referencing the originally preserved “parent” farm described by metes and bounds in the

deed of easement recorded at the time of preservation, and is to be employed in the context of a division of the premises and resulting distribution of allocated soil disturbance.

“Preexisting soil disturbance” is a new definition, meaning soil disturbance that exists on the premises as reflected in the Nearmap Spring 2023 Vertical Imagery.

The definitions of “production waiver” and “riparian zone” in the originally proposed rules have been deleted, as the production waiver has been eliminated, and the reference to riparian zone is inapplicable because there is no need for a stewardship conservation plan, at revised N.J.A.C. 2:76-25.6.

The definition of “stewardship conservation plan” has been deleted because it pertained to the production waiver process eliminated in the revisions at N.J.A.C. 2:76-25.6.

N.J.A.C. 2:76-25.4

Certain agricultural practices exempt from the soil disturbance limit at N.J.A.C. 2:76-25.5 and listed at N.J.A.C. 2:76-25.4(a) have been revised for consistency with other rules set forth in this notice of proposed substantial changes and, in one instance, a practice has been added.

N.J.A.C. 2:76-25.4(a)3 has been revised to exempt preexisting open ditches, and paragraph (a)4 has been revised to exempt preexisting agricultural water impoundments, as reflected on the Nearmap Spring 2023 Vertical Imagery.

N.J.A.C. 2:76-25.4(a)14 is a new provision that exempts storage of naturally derived materials, such as, but not limited to, hay bales, lime, silage, compost, wood chips, and manure, that are produced on the premises, or required for use on the premises within a 12-month period, provided the storage is not otherwise associated with soil alternation, soil surfacing, or soil compaction.

N.J.A.C. 2:76-25.4(c) has been revised by replacing the vague word “farm” with “premises” for consistency with other new definitions and substantially changed rulemaking.

N.J.A.C. 2:76-25.5

N.J.A.C. 2:76-25.5(a) is a new provision clarifying that only authorized activities pursuant to the deed of easement may count as permissible soil disturbance at N.J.A.C. 2:76-25.5(b). Other disturbances determined by the SADC to constitute impermissible activities pursuant to the deed of easement, such as the dumping of waste material or the altering of a farm in connection with recreational activities, do not count toward the 12 percent/four-acre limit.

Proposed new N.J.A.C. 2:76-25.5(b) establishes the allocated soil disturbance on each farm premises of 12 percent of the area of the premises, or four acres, whichever is greater. “Premises” includes any part of an originally preserved premises that is proposed to be divided in a complete division application received by the Committee on or before October 1, 2024, and subsequently approved by the Committee.

The originally proposed N.J.A.C. 2:76-25.5(b), (b)1, and (b)3 included provisions allowing a preserved farm landowner the option of seeking review and approval by the SADC to increase the extent of soil disturbance over and above the disturbance existing as of July 1, 2023, in an amount equal to two percent of the premises or one acre, whichever is greater. This originally proposed language has been deleted in its entirety due to new N.J.A.C. 2:76-25.5(c), allowing for a total disturbance limit on premises existing before October 1, 2024, equal to preexisting soil disturbance plus the allocated soil disturbance of 12 percent or four acres, whichever is greater.

Originally proposed N.J.A.C. 2:76-25.5(b)2 (recodified in this notice as N.J.A.C. 2:76-25.5(e)) has been revised to reflect that the soil disturbance limit is based on mapping or amended mapping developed by the SADC and provided to the landowner as set forth at N.J.A.C. 2:76-25.10 and 25.10(e), respectively.

N.J.A.C. 2:76-25.6

Originally proposed N.J.A.C. 2:76-25.6(b) has been revised, consistent with other changes at N.J.A.C. 2:76-25.6, eliminating the production waiver, by deleting language regarding a waiver and replacing it with “approval of an innovative agricultural practice.” Similar revisions are proposed at paragraph (c)2 (originally proposed paragraph (c)3), in which “project” is replaced with “agricultural practice”; subsection (d)

(originally proposed subsection (e)), in which “an innovation waiver” is replaced with “approval of an innovative agricultural practice”; at subsection (e) (originally proposed subsection (f)), in which “a waiver” is replaced with “an innovative agricultural practice approval”; and at paragraph (e)3 (originally proposed paragraph (f)3), in which “a waiver” is replaced with “an innovative agricultural practice approval.”

At recodified N.J.A.C. 2:76-25.6(f)1ii, “project” has been replaced with “innovative agricultural practice”; subparagraph (f)1iii has been revised to require “a statement of the economic impact of the innovative agricultural practice to the farm operation”; originally proposed subparagraph (i)1iv, requiring an alternatives analysis, has been deleted in keeping with the intent to streamline the application process; at originally proposed subparagraph (f)1v (recodified as subparagraph (f)1iv), the word “project” has been replaced with “practice”; at originally proposed subparagraph (i)1vi (recodified subparagraph (f)1v), “disturbance area” has been replaced with “practice”; originally proposed subparagraph (i)1vii has been deleted due to the now inappropriate reference to a stewardship conservation plan; originally proposed paragraph (i)2 has been deleted based on an expectation that innovation waivers will not be sought for structures, thus rendering moot an applicant’s submittal of zoning, building, and development plans, site plans, permits, and stormwater management plans. Recodified paragraph (f)2 is revised to insert “location,” before “extent”; modifying “existing” to “preexisting” and adding “and allocated” before the word “disturbance”; deleting “disturbance with a tabulation of total combined disturbances” and replacing it with “innovative agricultural practice; and”; originally proposed paragraphs (i)4, 5, and 6 have been deleted due to the elimination of the need for a stewardship conservation plan and forest stewardship plan for approval of an innovative agricultural practice; and at recodified paragraph (f)3, the word “waiver” is deleted and replaced with “innovative agricultural practice.”

Recodified N.J.A.C. 2:76-25.6(g) has been revised. In addition to the changes at paragraph (g)3 noted in the response to comments, paragraph (g)1 has been revised to delete “application for a waiver satisfying the requirements at (b), (c), and (d) or (e) above” and to replace that phrase with “approval of a proposed innovative agricultural practice satisfying the requirements of this section.” Originally proposed N.J.A.C. 2:76-25.6(j)2, requiring a calculation to three decimal places, has been deleted because the location and extent of an innovative practice are already required in the rules, thus obviating the need for such a calculation. Recodified N.J.A.C. 2:76-26.5(g)2, providing that when a county or qualified tax-exempt nonprofit organization is the deed of easement grantee, the innovative practice must be jointly authorized by that grantee and by the Committee; also at paragraph (g)2, the word “waiver” has been replaced with “innovative agricultural practice.”

Recodified N.J.A.C. 2:76-25.6(g)4 is proposed with the following revisions: the word “waiver” at paragraph (g)4 is replaced with “innovative agricultural practice”; the phrase “waiver activity” at subparagraph (g)4i is replaced with “innovative agricultural practice”; subparagraph (g)4ii is deleted due to the elimination of the requirement of a stewardship conservation plan; at recodified subparagraph (g)4ii, “proposed disturbance” is deleted, “waiver” is replaced with “innovative practice,” and “proposed conservation measures set forth in the proposed stewardship conservation plan” and “including the limit of disturbance area” are deleted; at recodified subparagraph (g)4iii, “proposed disturbance,” is deleted, “waiver” is replaced with “innovative practice,” and “proposed conservation measures” is deleted; at recodified subparagraph (g)4iv “waiver activity” is deleted and replaced with “innovative practice request”; and at recodified subparagraph (g)4v “of the waiver” is deleted as unnecessary.

At originally proposed N.J.A.C. 2:76-25.6(k) (recodified as N.J.A.C. 2:76-25.6(h)), the word “waiver” is replaced by “innovative agricultural practice.” N.J.A.C. 2:76-25.6(h) is now a complete sentence with deletion of the colon after “until” and inclusion of the phrase “the grantor obtains and complies with all required permits and approvals” that appeared at originally proposed N.J.A.C. 2:76-25.6(k)4. Originally proposed N.J.A.C. 2:76-25.6(k)1, 2, and 3 have been deleted because of now unnecessary references to conservation plans. New N.J.A.C. 2:76-25.6(i) is proposed to provide for Committee inspection of farms that have received approval for an innovative practice, as needed.

At recodified N.J.A.C. 2:76-26.5(i), “Waiver(s)” is replaced with “An innovative agricultural practice approval”; the word “waiver” is deleted before the word “approval”; and in the next sentence, the words “a waiver” is deleted and replaced with “the approval”; and “limit of disturbance area” is deleted and replaced with “area occupied by the innovative agricultural practice.”

N.J.A.C. 2:76-25.7

Originally proposed N.J.A.C. 2:76-25.7(a) has been revised by deleting the words “The” and “allocation allowed” and inserting in their place “Allocated” and “authorized,” respectively, and the cross-reference has been revised to include the reference to N.J.A.C. 2:76-25.5(b) to make clear that allocated disturbance can be moved from one premises to another contiguous premises, but that preexisting disturbance cannot be so moved. The phrase “provided the total new combined allocated disturbance acreage does not exceed the combined individual allocations for each premises comprising the contiguous premises” has been deleted as unnecessary and, in its place, “or which will be owned by the same grantor upon effectuation of the aggregation” has been inserted. This change is intended to address the situation in which contiguous premises are not owned by the same owner at the time of application for the consolidation, but the conveyance of one or more contiguous premises to consolidate ownership precedes the approval of an application to aggregate soil disturbance on those premises.

Originally proposed N.J.A.C. 2:76-25.7(b) and (c) have been revised for accuracy and consistency. At subsection (b), “aggregation between” has been replaced with “consolidation of” required in the context of merging contiguous premises, not distributing allocated soil disturbance; in the last sentence at subsection (b), and for the same reasons, “aggregated parcels” has been deleted and “consolidated premises” inserted in its place for textual consistency. At subsection (c), the same context discussed in the changes at subsection (b) result in adding “of soil disturbance” after “aggregation” and “of premises” after “consolidation”; “permitted” has been replaced with “allocated” and “respective” has been replaced with “consolidated.”

Originally proposed N.J.A.C. 2:76-25.7(d) was revised to better describe the separation of previously consolidated premises. “Rescission” replaces “disaggregation” and “aggregated premises” is replaced with “the consolidation previously approved.” At paragraph (d)1, “allocated” is inserted before “soil disturbance” and “limitation” is deleted; “disaggregated” is replaced by “consolidated” to describe the premises more accurately.

N.J.A.C. 2:76-25.8

Originally proposed N.J.A.C. 2:76-25.8(a) has been deleted, and originally proposed N.J.A.C. 2:76-25.8(b) has been substantially revised, due to changes at N.J.A.C. 2:76-25.7, the new definition of “allocated soil disturbance” at N.J.A.C. 2:76-25.3, and new criteria for distributing soil disturbance upon a division of premises. Newly codified N.J.A.C. 2:76-25.8(a) allows for the reallocation of “allocated soil disturbance” to each parcel resulting from a division of premises, so long as the reallocation ensures that each divided premises is agriculturally viable as determined by the Committee in accordance with N.J.A.C. 2:76-6.15(a)15, but in no case can the reallocation to a divided premises be less than two acres of disturbance. Originally proposed N.J.A.C. 2:76-25.8(c) and (d) (recodified as subsections (b) and (c)), are proposed for amendment to add “acreage of the” before “total soil disturbance” for clarity, and “(b)” added after “N.J.A.C. 2:76-25.5” for accuracy.

N.J.A.C. 2:76-25.10

Originally proposed N.J.A.C. 2:76-25.10(a) has been revised to delete “July 1, 2023,” as unnecessary.

N.J.A.C. 2:76-25.10(b) has been revised to address farms preserved prior to October 1, 2024, the approximate date the Committee will authorize promulgation of the notice of adoption, and requires that written notice and the baseline soil disturbance map shall be sent to the preserved farm landowner at the landowner’s last known address through certified mail, return receipt requested, and to the grantee, if applicable. Delivery of the notice and map through regular mail has been deleted from subsection (b); however, the change at paragraph (b)1 adds that if the certified mail is returned unclaimed or undeliverable, the Committee shall

make good faith efforts to provide an alternate manner of service, including regular mail or email delivery of the notice and map. Originally proposed N.J.A.C. 2:76-25.10(b)2 adds “soil disturbance” after “baseline” for consistency.

Originally proposed N.J.A.C. 2:76-25.10(b)4, allowing for the dispute of the baseline soil disturbance map, has been revised to delete the reference to two percent or one acre of disturbance, as that provision has been eliminated from revised N.J.A.C. 2:76-25.5. Revisions also clarify, by deleting “grantor,” that anyone can seek reconsideration of the calculated extent or assigned classification of soil disturbance features by submitting a written request to the Committee within 60 days of receipt of the written notice provided at subsection (b), and in accordance with N.J.A.C. 2:76-25.12(a).

New N.J.A.C. 2:76-25.10(c) addresses farms preserved after October 1, 2024. For those farms, subsection (c) provides that the baseline soil disturbance map shall be furnished to the grantor and grantee prior to the date of closing on the purchase of the development easement, and the grantor and grantee are to acknowledge receipt of and concur with the map prior to the closing taking place.

Originally proposed N.J.A.C. 2:76-25.10(c) has been substantially revised and recodified as subsection (d). This revised rule allows a grantor to dispute any aspect of the baseline soil disturbance map by submitting a written request to the Committee, in accordance with N.J.A.C. 2:76-25.12(a), within 60 days of receipt of the map, seeking reconsideration of the calculated extent or assigned classification of soil disturbance features. The failure to submit such a written request within the 60-day period constitutes grantor’s consent to the soil disturbance baseline mapping for the premises.

Recodified N.J.A.C. 2:76-25.10(e) provides that grantors and grantees may submit a written request to the Committee, in accordance with N.J.A.C. 2:76-25.12(a), for reconsideration of the calculated extent or assigned classification of “allocated,” as opposed to preexisting soil disturbance reflected on the then-current soil disturbance map features at any time.

Originally proposed N.J.A.C. 2:76-25.10(h) has been relocated to N.J.A.C. 2:76-25.6(i), for clarity.

N.J.A.C. 2:76-25A.2

Originally proposed N.J.A.C. 2:76-25A.2 has been revised by deleting “waivers,” which are no longer part of Subchapter 25, and inserting “exemptions.”

N.J.A.C. 2:76-25A.3

The definitions of “avoid control trap system,” “constrained slopes,” “forest land,” “highly erodible land,” “limit of disturbance,” “production waiver,” and “vegetated filter strip” have been deleted because those terms were associated with criteria to obtain and implement waivers which are no longer part of Subchapter 25.

N.J.A.C. 2:76-25A.7 and 25A.8

Originally proposed N.J.A.C. 2:76-25A.7 and 25A.8 have been deleted in their entirety, as those sections were associated with criteria to obtain and implement waivers, which are no longer part of Subchapter 25.

Effect of Proposed Changes on Impact Statements Included in Original Proposal

The changes to the proposed rules allow for soil disturbance on preserved farms equal to 12 percent of the area of the premises or four acres, whichever is greater, and simplify a process by which a preserved farm landowner can qualify for approval to implement innovative agricultural practices that do not count as soil disturbance. In addition, for farms preserved prior to October 1, 2024, the proposed changes exclude soil disturbance on the farm existing as of Spring 2023, from counting toward the allowable 12 percent or four-acre limit. This exclusion of preexisting disturbance simplifies the rule and obviates the need for two provisions in the originally proposed rule: one which allowed farms at or near the 12 percent/four-acre limit to qualify for an additional one acre, or two percent additional disturbance allocation; and another which allowed landowners to obtain a production waiver to reach 15 percent or six acres of disturbance, whichever was greater, in exchange for implementation of certain stewardship and construction practices.

The proposed changes result in the elimination of various definitions in the originally proposed rules; the addition of other definitions to facilitate the administration of the newly proposed rules; the elimination or simplification of certain procedures; and some reorganization of the originally proposed provisions. The SADC has concluded that the changes will not affect the Social, Federal Standards, Jobs Impact, Housing Affordability, Smart Growth, or Racial and Ethnic Community Criminal Justice and Public Safety impact statements included in the original notice of proposal.

The SADC has concluded that changes to the proposed rules will affect the Economic Impact, Agriculture Industry Impact, and Regulatory Flexibility Analysis statements.

Economic Impact

The proposed rule changes will have a positive economic impact. By excluding soil disturbance in existence as of Spring 2023, from counting toward the overall disturbance allowance for farms preserved prior to October 1, 2024, the proposed changes insulate those farms from any real or perceived negative economic impacts of not knowing there were, or anticipating there would be, limits on soil disturbance associated with their farming operations when they entered into the farmland preservation program. These changes put existing preserved farms on equal economic footing with new farms entering the program in the future in that they understand from this point forward the limits of disturbance allowed, thus avoiding any disruption in their future agricultural development and expansion plans.

The corresponding elimination of the production waiver provisions in the rule proposal will have a positive economic impact by reducing overall costs of compliance for farms that were most likely to seek production waiver approvals entailing the implementation of a stewardship conservation plan and construction standards. In addition, for farms seeking approval of an innovative agricultural practice (previously termed an “innovation waiver”), the proposed rule changes eliminate originally proposed public notice requirements, thus reducing the time and expense associated with preparing and sending such notices.

Agriculture Industry Impact

The proposed rule changes will have a positive impact on the agriculture industry. By defining the nature and permissible extent of soil disturbance pursuant to ARDA and the recorded deed of easement, preserved farm landowners will be better able to make informed business decisions regarding their farm operations and have confidence that their agricultural development, if conducted in accordance with the rules, will not result in deed of easement enforcement actions.

The proposed rules will have a positive impact on the agriculture industry by ensuring that productive farmland soils are preserved for future preserved farm landowners for a variety of agricultural uses.

The rules provide substantial flexibility to existing preserved farm landowners and to those landowners seeking to have their farms preserved. The rules set forth a number of specifically identified common farm practices and conservation measures that are exempt from the soil disturbance limit; allow for the designation of additional exemptions by the Committee upon approval of requests by the landowner or the holder of the farmland preservation deed of easement; and authorize all preserved farms the ability to increase soil disturbance through an allowance of soil disturbance equal to 12 percent or four acres, whichever is greater.

The proposed regulatory changes also provide preserved farm landowners the ability to engage in innovative agricultural practices in order to facilitate agricultural production in a way that does not negatively affect the agricultural soil and water resources on the farm for future generations of farmers.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. (Act), requires that a notice of proposal of rules that impose reporting, recordkeeping, or other compliance requirements on small businesses include an analysis describing the requirements and costs imposed, and the methods used to minimize any adverse economic impact, on small businesses. A small business is any business that is resident in New Jersey, independently owned and operated, and not dominant in its field, which employs fewer than 100 full-time employees.

The rules will apply to all of the approximately 2,900 preserved farm properties in this State, a majority of which, the SADC estimates would be considered small businesses. Additionally, many individuals and entities own and/or operate more than one preserved farm as part of a larger commercial agricultural operation. The SADC is unable to quantify with certainty the number of individuals and entities owning and/or operating preserved farms that are small businesses as defined in the Act. However, as noted below, the proposed rules have been designed to have no or minimal economic impact on the overwhelming majority of preserved farms, and the rules set forth various exemptions and the opportunity to innovate beyond the soil disturbance limit that does not negatively affect the agricultural soil and water resources on the farm for future generations of farmers.

The SADC’s mapping analyses of the 2,902 preserved farms reflects that the average disturbance per farm across the program is just over one acre, or 1.35 percent of the average sized farm. Approximately 90 percent of farms have utilized less than 25 percent of their soil disturbance allocation and 96.5 percent of farms have used less than one-half of their allocation; consequently, these farms’ agricultural operations will likely not be affected by the proposed soil disturbance limit of 12 percent or four acres, whichever is greater, particularly because disturbance existing as of Spring 2023 will not count toward the soil disturbance limit.

Landowners preserving their farms after adoption of the rule will clearly understand the permissible limits of soil disturbance, so that they can make an informed decision whether those limits are compatible with their long-term agricultural business plans.

With the accommodation of preexisting soil disturbance, if any, on already preserved farms, no preserved farm landowner will need to apply, pursuant to the proposed rule changes for a production waiver, thus eliminating the uncertainty in the approval process and the costs of construction and stewardship plan implementation if the waiver were approved.

The proposed rules do not require preserved farm owners or operators to file reports or to maintain records, as reporting and recordkeeping will be the responsibility of the counties, nonprofit organizations, or the SADC that monitor those farms as the grantees pursuant to the farmland preservation deeds of easement.

The overwhelming majority of preserved farms will have no initial or annual compliance costs because, as stated above, those preserved farms have no or minimal existing soil disturbance. The SADC cannot accurately estimate compliance costs for innovative agricultural practice approvals, which will vary depending on the practice, preexisting soil disturbance (if any), agricultural business size, project complexity, and site conditions.

Full text of the proposed substantial changes to the proposed new rules follows (additions to proposal indicated in boldface **thus**; deletions from proposal indicated in brackets [thus]):

SUBCHAPTER 25. SOIL DISTURBANCE ON PRESERVED FARMLAND

2:76-25.3 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

...
“Allocated soil disturbance” means disturbance authorized pursuant to N.J.A.C. 2:76-25.5(b).

...
“Baseline soil disturbance map” means a map generated by the Committee pursuant to N.J.A.C. 2:76-25.10 using the image of record and which reflects the extent and location of soil disturbance on a premises.

...
“Contiguous premises” means adjacent [properties] premises, even if they are separated by human-made barriers or structures or legal boundaries. Contiguous premises shall include, but are not limited to, land areas [which] that directly abut or are separated by a general access roadway or other rights-of way, including waterways.

...

["Existing agricultural water impoundment" means an excavated, unlined farm pond, or dammed impoundment fed by surface water or groundwater for irrigating agricultural crops or watering livestock that is reflected in the baseline map established pursuant to N.J.A.C. 2:76-25.10. Agricultural water impoundments shall not include other types of water-related structures including, but not limited to, decorative or recreational ponds, wildlife ponds, stormwater management facilities, aquaculture ponds, pools, manure lagoons, tailwater recovery ponds, ponds constructed primarily for hydropower uses, or naturally occurring ponds and wetlands but not including existing open ditches, as that term is defined in this subchapter. Associated berms or dams are considered soil alteration or soil surfacing.

"Existing open ditch" means a vegetated, unlined canal, ditch, open drain, conveyance swale, or similar structure used to convey water that is reflected in the baseline map established pursuant to N.J.A.C. 2:76-25.10 and may be associated with an existing agricultural water impoundment or utilized to convey runoff from crop fields or underground drainage systems.]

"Divided premises" means two or more portions of the original premises resulting from a division approved by the Committee.

...
 ["Forest land" means a portion of the premises covered with a large and thick collection of growing trees of at least five contiguous acres in size and not less than 120 feet wide. Forest land does not include land devoted to the production of Christmas trees, nursery stock, orchard, or similar areas where trees are primarily grown to harvest their fruits, nuts, stems, or flowers.

"Forest stewardship plan" has the same meaning as that term is defined at N.J.A.C. 7:3-1.3.]

...
 "Hoophouse" means an individual temporary agricultural structure that is used exclusively for the production and storage of live plants by protecting them from the sun, wind, excessive rainfall, or cold, or to extend the growing season. A hoophouse is constructed of a metal, wood, or durable plastic frame covered with polyethylene, polycarbonate, plastic, or fabric material [and does not have a permanent foundation, footings, ground-level surface, or anchoring system]. The frame and exterior covering may or may not be removed during the growing season. "Hoophouse" includes structures commonly known as "high tunnel," "low tunnel," "temporary greenhouse," or "polyhouse."

...
 "Image of record" means the aerial imagery upon which the baseline soil disturbance map and preserved farmland land use features are generated. For premises preserved prior to October 1, 2024, the image of record is the Nearmap Spring 2023 Vertical Imagery. For premises preserved after October 1, 2024, the image of record is the most current aerial imagery available, as determined by the Committee.

["Innovation waiver] Innovative agricultural practice" means [a waiver that allows] an agricultural practice proposed by the grantor [to implement a new or innovative agricultural practice] that is not otherwise considered exempt pursuant to N.J.A.C. 2:76-25.4 and which, if approved by the Committee in advance, shall not count towards the soil disturbance limit set forth at N.J.A.C. 2:76-25.5.

["Limit of disturbance" means a clearly delineated area around a proposed area of disturbance authorized pursuant to a waiver, inside which all construction-related activities occur, including, but not limited to site preparation, grading, equipment traffic, construction, and staging. Existing disturbed areas are not part of the limit of disturbance.]

...
 "Original premises" means the property described by metes and bounds in the farmland preservation program deed of easement recorded at the time of preservation.

...
 "Preexisting agricultural water impoundment" means an excavated, unlined farm pond or dammed impoundment fed by surface water or groundwater for irrigating agricultural crops or watering livestock that is reflected in the Nearmap Spring 2023 Vertical Imagery. Agricultural water impoundments shall not include other types of water-related structures including, but not limited to,

decorative or recreational ponds, wildlife ponds, stormwater management facilities, aquaculture ponds, pools, manure lagoons, tailwater recovery ponds, ponds constructed primarily for hydropower uses, or naturally occurring ponds and wetlands, but not including existing open ditches. Associated berms or dams are considered soil alteration or soil surfacing.

"Preexisting open ditch" means a vegetated, unlined canal, ditch, open drain, conveyance swale, or similar structure used to convey water that is reflected in the Nearmap Spring 2023 Vertical Imagery. A preexisting open ditch may be associated with an existing agricultural water impoundment or utilized to convey runoff from crop fields or underground drainage systems.

"Preexisting soil disturbance" means soil disturbance that exists on the premises as reflected on the Nearmap Spring 2023 Vertical Imagery.

"Premises" means the property [under easement that is defined] described by [the legal] metes and bounds [description] in the farmland preservation program deed of easement, including an original premises or a divided premises.

["Production waiver" means a waiver that allows the grantor to exceed the soil disturbance limits established at N.J.A.C. 2:76-25.5, up to a maximum of 15 percent of the premises or six acres, whichever is greater.

"Riparian zone" has the same meaning as the term that is defined at N.J.A.C. 7:13-1.2.]

...
 ["Stewardship conservation plan" means a farm conservation plan that meets or exceeds the planning criteria for all soil and water resources identified on the premises.]

2:76-25.4 Exemptions

(a) The following agricultural practices shall not constitute soil disturbance for purposes of determining compliance with the soil disturbance limitation set forth at N.J.A.C. 2:76-25.5, and shall be considered exempt agricultural practices:

- 1.-2. (No change from proposal.)
3. [Existing] **Preexisting** open ditches, as reflected on the Nearmap Spring 2023 Vertical Imagery;
4. [Existing] **Preexisting** agricultural water impoundments, as reflected on the Nearmap Spring 2023 Vertical Imagery;
- 5.-13. (No change from proposal.)

14. **Storage of naturally derived materials produced on the premises, or required for use on the premises within a 12-month period, and which is not otherwise associated with soil alternation, soil surfacing, or soil compaction. "Naturally derived materials" include, but are not limited to, hay bales, lime, silage, compost, wood chips, and manure.**

Recodify proposed 14.-23. as **15.-24.** (No change from proposal.)

(b) (No change from proposal.)

(c) A conservation practice may also be considered exempt, if the Committee finds that the water and erosion control measure meets the criteria at (b)2, 3, 4, 5, 7, 8, and 9 above, and is necessitated by factors beyond the control of the grantor including, but not limited to, natural weather conditions or drainage coming from off the [farm] premises, such as stormwater from public roads and/or adjacent properties.

(d)-(g) (No change from proposal.)

2:76-25.5 Soil disturbance limitations

(a) Soil disturbance may occupy up to 12 percent of the premises or four acres, whichever is greater.

(b) If a grantor does not elect to use the soil disturbance calculation provided at (a) above, the grantor may seek permission from the Committee to increase the extent of soil disturbance on the premises over and above the total soil disturbance existing on the premises as of July 1, 2023, in an amount totaling an additional two percent of the premises, or one acre, whichever is greater.

1. The grantor is eligible for an allocation of an additional two percent or one acre of disturbance if the grantee and Committee determine that:

i. The premises complies with the farmland preservation deed of easement; and

ii. The disturbance proposed on the premises exceeds the soil disturbance limitation pursuant to (a) above.]

(a) **Only activities authorized pursuant to the deed of easement may count as permissible disturbance for purposes of this section. Other disturbance associated with activities that are determined by the Committee to constitute impermissible activities pursuant to the deed of easement including, but not limited to, the dumping of waste material or alteration of a farm in connection with recreational uses, do not count toward the soil disturbance allowances set forth at (b) below.**

(b) **The allocated soil disturbance for each premises is equal to 12 percent of the area of the premises, or four acres, whichever is greater. For purposes of this section, “premises” shall include any portions of an original premises proposed to be divided as set forth in a complete division application received by the Committee on or before October 1, 2024, and which application is subsequently approved by the Committee.**

(c) **For premises preserved prior to October 1, 2024, the total limit on soil disturbance equals the sum of preexisting soil disturbance in addition to the allocated soil disturbance as set forth at (b) above.**

(d) **For farms preserved after October 1, 2024, the total limit on soil disturbance equals the allocated soil disturbance set forth at (b) above.**

[2.] (e) The Committee shall utilize the **baseline** soil disturbance [base] map issued to the grantor pursuant to N.J.A.C. 2:76-25.10 or, if applicable, the amended [base] **baseline soil disturbance** map established pursuant to N.J.A.C. 2:76-25.10(e), as the basis upon which the [additional two percent or one acre, whichever is greater,] **soil disturbance limit** shall be calculated.

[3. The Committee shall issue a final decision on the grantor’s request to increase the extent of soil disturbance on the premises over and above the total soil disturbance existing on July 1, 2023, totaling an additional two percent of the premises, or one acre, whichever is greater.]

Recodify proposed (c)-(e) as (f)-(h) (No change from proposal.)

[(f)] (i) Soil disturbance located outside the boundaries of the premises, including, but not limited to, severable and non-severable exception areas, residential exclusion areas, and any other area(s) of a farm not subject to the terms and conditions of the deed of easement, shall not count towards the limitation set forth at [(a)] (c) or (d) above, **as applicable.**

[(g)] (j) Removal of topsoil from the premises is expressly prohibited, except as directly related and incidental to the harvesting of agricultural and horticultural products, such as in soil that is **typically** removed with roots when sod [is] or **dug nursery stock** are harvested.

2:76-25.6 [Waivers] **Innovative agricultural practice approval**

(a) Upon the approval of both the Committee and grantee, a grantor may receive [a waiver or waivers of the soil disturbance limitation pursuant to N.J.A.C. 2:76-25.5. The grantor may apply for one or both types of the following waivers:

1. A production waiver, which shall allow additional soil disturbance to a maximum limit of 15 percent of the premises or six acres, whichever is greater, provided the grantor meets all the eligibility criteria and conditions listed at (b), (c), and (d) below and the disturbance proposed on the premises exceeds the soil disturbance limitation at N.J.A.C. 2:76-25.5; and/or

2. An innovation waiver, which] **approval to implement an innovative agricultural practice that shall [allow additional] not count as soil disturbance [beyond the limits established pursuant to N.J.A.C. 2:76-25.5 and the production waiver limit at (a)] above] and is not considered exempt pursuant to N.J.A.C. 2:76-25.4,** provided the grantor meets all the eligibility criteria and conditions at (b), (c), and [(e)] (d) below.

(b) A grantor shall be eligible to apply for [a waiver] **approval of an innovative agricultural practice** pursuant to this section if the grantee and Committee determine that the premises complies with the farmland preservation deed of easement.

(c) For a grantor to be eligible for [either waiver] **approval of an innovative agricultural practice** pursuant to (a) above, the proposed [project] **innovative agricultural practice** shall meet the following conditions, as determined by the grantee and the Committee:

[1. There is no apparent feasible alternative to a proposed project resulting in soil disturbance on the preserved farm beyond the limitation pursuant to N.J.A.C. 2:76-25.5, which would avoid or substantially reduce the proposed soil disturbance;]

[2.] 1. It is not feasible to utilize areas of existing soil disturbance that would provide sufficient land area for the proposed [use, nor is it feasible to implement a certified rehabilitation project on the premises pursuant to N.J.A.C. 2:76-25.9 which, once completed, would render the need for a waiver unnecessary] **innovative agricultural practice;**

[3.] 2. (No change from proposal.)

[4. The grantor has obtained, and the Committee has approved, a stewardship conservation plan for the premises.

i. The stewardship conservation plan shall maintain the functional integrity of vegetation in the riparian zone.

ii. For the purposes of meeting the planning criteria for sheet and rill erosion, the following shall apply:

(1) Soil attached to crops at harvest shall be excluded from the soil loss calculation; and

(2) Soil loss shall be averaged over a crop rotation period not to exceed five years;

5. The grantor has obtained a forest stewardship plan for all forest land on the premises; and

6. The grantor provides a long-term maintenance plan for conservation measures associated with the proposed disturbance.

(d) A grantor shall be eligible for a production waiver if the grantee and Committee, in addition to (b) and (c) above, determine all the following conditions are met:

1. All site preparation, grading, equipment traffic, construction, and staging is confined to a specified limit of disturbance area or area of existing disturbance; and

2. The project design adheres to one or more the following sets of standards and criteria, as determined by the Committee:

i. Construction standards for expedited production waivers pursuant to N.J.A.C. 2:76-25A.7; or

ii. The low impact disturbance design criteria pursuant to N.J.A.C. 2:76-25A.8.]

[(e)] (d) A grantor shall be eligible for **approval of an [innovation waiver] innovative agricultural practice** if the grantee and Committee, in addition to (b) and (c) above, determine all the following conditions are met:

1. The [project] **innovative agricultural practice:**

i.-iii. (No change from proposal.)

2. (No change from proposal.)

[(f)] (e) An application for [a waiver] **an innovative agricultural practice approval** shall be filed with the Committee, and the Committee shall provide the grantee, if applicable, a copy of the application.

1.-2. (No change from proposal.)

3. The grantee shall take no action on the request for [a waiver] **an innovative agricultural practice approval** until the grantee receives copies of the complete application and all supporting materials from the Committee.

[(g)] Within 30 days of receipt of written notice from the Committee that the application is complete, the grantor shall provide written notice of the application, at the grantor’s sole expense, through certified mail, return receipt requested, and/or by personal service, to:

1. The clerk and land use board secretary of the municipality in which the premises is located. If the premises is located within 200 feet of an adjoining municipality, then written notice of the application shall also be given to the clerk and land use board secretary of the adjoining municipality;

2. The owners of all real property, on the current tax duplicates, within 200 feet in all directions of the premises. The grantor shall be solely responsible to pay for, and obtain, a certified list of property owners in accordance with N.J.S.A. 40:55D-12c.; and

3. The county planning board, if the premises is located adjacent to a county road.

(h) The notice provided by the grantor pursuant to (g) above shall include the following: the type of waiver sought in the application, a complete description of the project, the conservation measures set forth in the proposed stewardship conservation plan, the conservation measures

set forth in the forest stewardship plan, if applicable, the reason(s) necessitating the application, that comments on the application may be provided to, and that copies of the application materials can be obtained from, the Committee at: State Agriculture Development Committee, PO Box 330, Trenton, NJ 08625-0330, and sadc@ag.nj.gov.]

(i) (f) The application shall include, but not be limited to, the following information, as applicable:

1. A detailed narrative that includes all the following:
 - i. The agricultural purpose of the [project] **proposed innovative practice**;
 - ii. A description of the physical attributes of the proposed [project] **innovative agricultural practice**, including location, type, and characteristics of the proposed [disturbance,] **practice** and the materials to be utilized or placed on the land;
 - iii. [The] A **statement of the economic impact** of the [project] **proposed practice** to the farm operation;
 - iv. An alternatives analysis demonstrating alternate designs, locations, and/or rehabilitation of other areas for the project are infeasible;
 - v. A description of any potential physical impacts of the proposed [project] **practice** upon the premises and any contiguous properties; and
 - vi. v. A description of the existing land use(s) on the premises adjacent to the proposed [disturbance area] **practice** and any potential impacts of the proposed [project] **practice** on those land uses; and].
 - vii. A description of the conservation measures set forth in the proposed stewardship conservation plan and forest stewardship plan;
2. If the waiver request relates to the construction of agricultural structures, all necessary information relevant to support the request including, but not limited to, zoning, building and development plans, site plans, relevant permits, and, if applicable, stormwater management plans and calculations;]
- [3.] 2. A site map, or copy of the most recent soil disturbance map established pursuant to N.J.A.C. 2:76-25.10 for the premises, clearly depicting the **location**, extent, and type of both [existing] **preexisting and allocated soil** disturbance and the proposed new [disturbance with a tabulation of total combined disturbances] **innovative agricultural practice**; and
 - [4. A copy of the stewardship conservation plan;
 5. A maintenance plan for all resource management practices necessary to comply with the waiver, if applicable;
 6. A copy of the forest stewardship plan, if applicable; and]
- [7.] 3. Any additional information that the grantee or Committee determines is reasonable and necessary to evaluate whether the [waiver] **innovative agricultural practice** request meets the requirements of this section.

(j) (g) Application review and approval shall be as follows:

 1. In determining whether to grant [an application for a waiver] **approval of a proposed innovative agricultural practice** satisfying the requirements [at (b), (c), and (d) or (e) above] **of this section**, consideration shall be given to the extent to which the grantor's actions or inaction caused or contributed to the need to submit a request for [a waiver] **approval**;
 - [2. In calculating the permissible waiver limit, acreage shall be rounded to three decimal places (0.000);]
 - [3.] 2. If a county or a qualified tax-exempt nonprofit organization is the grantee of the development easement, any approval of [a waiver] **an innovative agricultural practice** pursuant to this section must be jointly authorized by the grantee and the Committee;
 3. **In considering the proposed innovative agricultural practice, the Committee may consult with the following agencies, organizations, or persons, as applicable:**
 - i. **The New Jersey Department of Agriculture;**
 - ii. **The New Jersey Agricultural Experiment Station, including appropriate county agents;**
 - iii. **County agriculture development boards;**
 - iv. **The State Soil Conservation Committee;**
 - v. **Any other states' departments of agriculture, land grant institutions, or agricultural experiment stations;**
 - vi. **The United States Department of Agriculture, or any other Federal governmental entity; or**

vii. **Any other organization or person that may provide expertise concerning the particular practice;**

4. The grantee and Committee shall prepare resolutions approving, conditionally approving, or denying the [waiver request] **innovative agricultural practice**. The resolution shall include, but not be limited to:

- i. A description of the proposed [waiver activity] **innovative agricultural practice**;
 - [ii. A description of conservation measures set forth in the proposed stewardship conservation plan;]
 - [iii.] ii. A map locating all existing soil disturbance, [proposed disturbance] areas subject to the [waiver] **innovative practice** request, [proposed conservation measures set forth in the proposed stewardship conservation plan,] and exempt activities on the premises[, including the limit of disturbance area];
 - [iv.] iii. Area calculations of all existing soil disturbance, [proposed disturbance] areas subject to the [waiver] **innovative practice** request, [proposed conservation measures] and exempt activities proposed on the premises;
 - [v.] iv. Any conditions specific to the [waiver activity] **innovative practice request**; and
 - [vi.] v. The reasons for approval, conditional approval, or denial [of the waiver]; and
5. (No change from proposal.)
- (k) (h) No disturbance associated with an approved [waiver] **innovative agricultural practice** may occur until[:
1. The grantor has implemented all required engineering practices, if applicable, as defined in the FOTG that are planned for year one of the stewardship conservation plan;
 2. The grantor is on or ahead of schedule with implementation of all other practices prescribed in the stewardship conservation plan;
 3. The forest stewardship plan has been approved by the New Jersey Forest Service and the grantor is on schedule with all prescribed management activities; and
 4. The] **the grantor obtains and complies with all required permits and approvals.**
1. **The Committee reserves the right to inspect all farms that have received Committee approval of an innovative agricultural practice request pursuant to this section, as needed, to determine ongoing compliance with such approval.**
- (l) (i) [Waiver(s)] **An innovative agricultural practice approval** granted pursuant to this section may be revoked at any time by the Committee if the grantor fails to maintain compliance with all conditions of [waiver] approval, the deed of easement, or this subchapter. If [a waiver] **the approval** is revoked, the [limit of disturbance] area **occupied by the innovative agricultural practice** shall be rehabilitated in accordance with N.J.A.C. 2:76-25.9 and 25A.9.
- 2:76-25.7 Aggregation and consolidation
- (a) [The] **Allocated** soil disturbance [allocation allowed] **authorized** pursuant to N.J.A.C. 2:76-25.5(b) may, upon joint approval, if applicable, of the grantee and the Committee, be aggregated on contiguous premises owned by the same grantor [provided the total disturbance acreage does not exceed the combined individual allocations for each premises comprising the contiguous premises] **or that will be owned by the same grantor upon effectuation of the aggregation.**
- 1.-4. (No change from proposal.)
 - (b) No [aggregation between] **consolidation of** contiguous premises shall be permitted unless those premises are restricted, such that each premises is permanently associated with, and shall not be conveyed separate and apart from, each other, except as provided at (d) below. The further division of [aggregated parcels] **consolidated premises** is prohibited.
 - (c) In the event the Committee approves an aggregation **of soil disturbance** and consolidation **of premises** in compliance with this section, the Committee shall prepare a document reflecting the reallocation of the [permitted] **allocated** disturbance and prohibiting further division of the [respective] **consolidated** premises in the future. The document shall be recorded with the county clerk, and a copy of the recorded document shall be provided to the grantor and, if applicable, to the grantee.

(d) The Committee may, upon a showing of reasonable cause, approve the [disaggregation] **rescission** of [parcels as permitted in] a **consolidation of premises previously approved pursuant to** this section.

1. The approval shall require that the **allocated** soil disturbance [limitation] for each [disaggregated] **unconsolidated** premises not exceed that set forth at N.J.A.C. 2:76-25.5(b).

(e) (No change from proposal.)

2:76-25.8 Division of the premises

(a) Each parcel resulting from a division of the premises approved by the Committee pursuant to N.J.A.C. 2:76-6.15(a)15 must comply with the soil disturbance limitation prescribed at N.J.A.C. 2:76-25.5 at the time of division.

(b) (a) The **acreage of allocated** soil disturbance [limitation prescribed at] **pursuant to** N.J.A.C. 2:76-25.5(b) [and disturbance associated with production waiver eligibility prescribed at N.J.A.C. 2:76-25.6(a)1] shall be [proportionally] **reallocated** to each of the [parcels] **divided premises** resulting from a division of premises pursuant to N.J.A.C. 2:76-6.15(a)15. **Such reallocation shall ensure that each divided premises has a sufficient allocated disturbance to be considered agriculturally viable, as determined by the Committee. In no case shall the disturbance reallocated to each premises be less than two acres.**

(c) (b) In the event the Committee approves a division of the premises, the Committee shall prepare a document reflecting the division and the [allocation] **distribution** of the [allowable] **reallocated** soil disturbance [on] **acreage** to the respective **divided** premises. The document shall be recorded with the county clerk, and a copy of the recorded document shall be provided to the grantor and, if applicable, to the grantee.

(d) (c) In no event shall an increase in the **acreage of the** total soil disturbance limitation prescribed at N.J.A.C. 2:76-25.5(b) result from a division of the premises.

2:76-25.10 Soil protection mapping and monitoring requirements

(a) A baseline soil disturbance map of each premises shall be established by the Committee [as of July 1, 2023].

(b) [Written] **For farms preserved prior to October 1, 2024, written notice** of the baseline soil disturbance map shall be provided by the Committee to the grantor [by regular] **by certified mail, return receipt requested**, to the grantor’s last known address. The Committee shall provide a copy of the baseline soil disturbance map to the **grantor and, if applicable, the grantee**[, if applicable].

1. If the mailing is returned as unclaimed or undeliverable, then the Committee shall make good faith efforts to provide an alternate manner of notice, **including through regular mail or electronic mail.**

2. The written notice shall include the baseline **soil disturbance** map and a link to the Committee’s website connecting to an online version of the [baseline] map depicting the extent and classification of identified soil disturbance features on the premises.

3. (No change from proposal.)

4. The written notice shall include a statement specifying that [any grantor seeking to qualify for an additional two percent or one acre of soil disturbance on the premises pursuant to N.J.A.C. 2:76-25.5(b), and] **anyone** who wishes to dispute the baseline soil disturbance map issued by the Committee pursuant to this section, shall submit, in writing, a request for reconsideration of the calculated extent or assigned classification of soil disturbance features contained in the baseline **soil disturbance** map [by () **within** 60 days of [the effective date of these new rules)] **receipt of the written notice**, and in accordance with N.J.A.C. 2:76-25.12(a).

(c) **For farms preserved after October 1, 2024, the baseline soil disturbance map shall be provided to the grantor and to the grantee prior to the date of closing on the purchase of the development easement. The grantor and grantee shall acknowledge receipt of and concurrence with the baseline soil disturbance map.**

(c) (d) A grantor [seeking to qualify for approval of an additional two percent or one acre of soil disturbance on the premises pursuant to N.J.A.C. 2:76-25.5(b), and] who wishes to dispute **any aspect** of the baseline soil disturbance map issued by the Committee pursuant to this section[,] shall submit a written request for mapping reconsideration of

the calculated extent or assigned classification of soil disturbance features contained in the baseline map [by () **within** 60 days of [the effective date of these new rules)] **receipt thereof** and in accordance with N.J.A.C. 2:76-25.12(a). Failure to submit a request for mapping reconsideration by the date specified in this subsection will constitute grantor’s consent to the soil disturbance baseline mapping for the premises.

(d) (e) [All other grantors] **Grantors** and grantees may submit to the Committee, a written request for mapping reconsideration of the calculated extent or assigned classification of **allocated** soil disturbance reflected on the then-current soil disturbance map features at any time.

Recodify proposed (e)-(g) as **(f)-(h)** (No change from proposal.)

(h) The Committee reserves the right to inspect all farms which received Committee approval of an additional soil disturbance allocation pursuant to N.J.A.C. 2:76-25.5(b) and/or of a waiver request pursuant to N.J.A.C. 2:76-25.6, as needed, to determine ongoing compliance with such approvals.]

2:76-25.12 Reconsideration and hearings requests

(a) (No change from proposal.)

(b) All hearings [by the Committee and a grantee that is a county in connection with] **pursuant to** applicable provisions at N.J.A.C. 2:76-24.5 through 25.10 shall be held **by the Committee, or by a grantee that is a county**, in accordance with the Senator Byron M. Baer Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.

SUBCHAPTER 25A. SUPPLEMENTAL SOIL DISTURBANCE STANDARDS

2:76-25A.2 Purpose

The purpose of this subchapter is to promulgate technical standards necessary for [waivers] **exemptions** and soil rehabilitation as set forth at N.J.A.C. 2:76-25.

2:76-25A.3 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

["Avoid-control-trap system" means a system for preventing pollution from sediment, nutrients, bacteria, and pesticides (pollutants) that prioritizes avoiding the introduction of pollutants into the environment, controlling the risks from the unavoidable introduction of pollutants and utilizing best management practices to trap pollutants close to their source to avoid their spread.]

... ["Constrained slopes" means any slopes equal to or greater than five percent as measured over a minimum run of 10 feet.]

... ["Forest land" has the same meaning as that term is defined at N.J.A.C. 2:76-25.3.

"Highly erodible land" means land that can erode at excessive rates as determined by the NRCS.

"Limit of disturbance" has the same meaning as that term is defined at N.J.A.C. 2:76-25.3.]

... ["Production waiver" has the same meaning as that term is defined at N.J.A.C. 2:76-25.3.]

... ["Vegetated filter strip" means a grassed filter area that meets or exceeds the requirements in the conservation practice standard for filter strips at (https://efotg.sc.egov.usda.gov/api/CPSFile/13129/393_NJ_CPS_Filter_Strip_2017) to reduce excess sediment in surface waters and dissolved contaminants, suspended solids, and associated contaminants in runoff.]

[2:76-25A.7 Construction standards for expedited production waivers

(a) A project proposed for an expedited production waiver shall meet all the criteria at (b) through (g) below, as applicable.

(b) The following criteria shall apply to all projects seeking to utilize expedited waiver construction standards:

1. No soil disturbance shall be planned:
 - i. Within wetlands or other regulated areas;

ii. In areas with karst topography, shallow depth to bedrock, organic soils, Highly Erodible Land designation, or acid producing soils, pursuant to a soil survey report or identified by NRCS;

iii. On any constrained slopes; or

iv. In forest land;

2. Disturbed areas shall be minimized while meeting the agronomic needs;

3. No deliberate mechanical soil compaction (for example, with a sheep-foot compactor or vibratory compactor, or similar) shall occur on the disturbed area;

4. Low ground pressure equipment and/or ground protection mats shall be used during construction on exposed soil;

5. No disturbance shall occur within the dripline of any wooded area, tree, or perennial crop outside the limit of disturbance;

6. At no time shall the topsoil be removed from the premises or mixed with the underlying subsoil;

7. All subsoil shall remain on the premises;

8. Preparation of proposed soil disturbance areas shall only occur when soil moisture within the limit of disturbance is at or below field capacity to avoid excessive rutting, mixing of topsoil and subsoil, and to minimize compaction; and

9. Soil disturbance activities shall not commence unless and until a waiver has been approved by the grantee and the Committee.

(c) The following maintenance requirements shall apply to all projects seeking to utilize construction standards for expedited production waivers:

1. Erosion occurring within or downslope of the disturbed area shall be stabilized promptly. If erosion occurs repeatedly within or adjacent to a disturbed area, additional conservation measures shall be adopted and implemented that meet the planning criteria; and

2. Topsoil stockpiles shall be maintained according to N.J.A.C. 2:76-25A.5.

(d) When a proposed project will cause soil compaction as defined at N.J.A.C. 2:76-25.3, all the following criteria shall apply:

1. Compacted areas shall not have soil alteration or soil surfacing;

2. No topsoil or subsoil shall be removed or moved for the construction or use of the compacted area;

3. Coarse organic mulch and/or ground protection mats shall be utilized when practical; and

4. The grantor shall plant and maintain a vegetated filter strip downstream of the compacted area.

i. Additional vegetated filter strips shall be planned at an interval within the compacted area necessary to prevent concentrated flow erosion.

ii. Vegetated filter strips shall be maintained until the compacted area is rehabilitated.

(e) When a proposed project will utilize ground-level surfaces, as defined at N.J.A.C. 2:76-25.3, all the following criteria shall apply:

1. Prior to construction of the ground-level surface, topsoil shall be removed, stockpiled, and stabilized pursuant to N.J.A.C. 2:76-25A.5;

2. Surfaced areas which require additional grading are considered soil alteration and shall also follow the criteria for altered soils at (g) below;

3. Surfaced areas shall be underlain with a suitable permeable woven or non-woven geotextile fabric to prevent base or surface material from becoming embedded into native soil while allowing water infiltration.

i. Fabric shall extend sufficiently beyond the ground-level surface to ensure native soil/surface material separation;

ii. The fabric shall be installed according to manufacturer's guidelines; and

iii. Additional layers of pressure-distributing material may be added;

4. At least six inches of appropriate permeable subbase shall be installed to properly distribute loads into the subsoil; and

5. Additional surfacing above the subbase:

i. May be added as necessary for the agricultural operation;

ii. Shall have an infiltration rate greater than or equal to the porosity of the underlying native soil;

iii. May include gravel, crushed concrete, cinders, shells, sand, soil, pavers, bricks, or blocks;

iv. Appropriate edging shall be installed around the perimeter of the facility to limit movement of material off the facility into the neighboring soil;

v. On-site topsoil shall not be used as a surface; and

vi. Shall not include poured concrete, asphalt, asphalt millings, porous asphalt, or porous concrete. If those surfaces are necessary, the design shall follow the low impact disturbance design criteria pursuant to N.J.A.C. 2:76-25A.8.

(f) When a proposed project will utilize suspended surfaces, as defined at N.J.A.C. 2:76-25.3, all the following criteria shall apply:

1. Rooftop runoff shall be managed using gutters or other management system to capture water for future use, infiltrate water to groundwater, and/or delay the timing of runoff to reduce the impact of the runoff;

2. A stormwater management plan and design shall be obtained for any required stormwater management facilities; and

3. For the land beneath the suspended surface:

i. The criteria for ground-level surfaces at (e) above shall be followed;

ii. The soil shall be protected with ground protection mats; or

iii. The soil shall be protected with coarse mulch of at least three inches.

(g) Where soil alteration, as defined at N.J.A.C. 2:76-25.3, is proposed, all the following criteria shall apply:

1. Prior to construction, topsoil shall be removed, stockpiled, and stabilized pursuant to N.J.A.C. 2:76-25A.5;

2. Grading shall only occur within the B soil horizon (the first soil horizon below the topsoil);

3. No grading shall go into lower soil horizons or bedrock;

4. All subsoil shall stay on-site, either stockpiled or as part of fill for the project.

i. Subsoil stockpiles shall be stabilized with temporary control measures to prevent soil loss due to wind and water erosion;

5. Exposed soil shall be permanently vegetated or otherwise stabilized within the first growing season;

6. For fill piles, including organic material, soil amendments, construction materials, or long-term subsoil piles:

i. The volume of material to be piled onsite shall be commensurate with the volume of material needed for an agricultural purpose on the grantor's farm management unit, using a nutrient management plan or other applicable NRCS conservation practices; and

ii. All imported material shall be free of asphalt, concrete, stone, other rubble, or other undesirable characteristics, as determined by the Committee; and

7. For organic fill piles, including mulch, compost, wood chips, manure, livestock bedding, and leaves, a vegetated filter shall be planted and maintained around the fill area. The vegetated filter strip shall be maintained until the fill area is rehabilitated.

(h) If a deviation from the standards in this section is necessary, the grantor shall follow the low impact disturbance design criteria pursuant to N.J.A.C. 2:76-25A.8.

2:76-25A.8 Low impact disturbance design criteria

(a) For a project to be eligible for a production waiver, the grantor shall describe how the proposed project addresses all the low impact disturbance design criteria described below:

1. Topsoil shall be stockpiled pursuant to N.J.A.C. 2:76-25A.5;

2. The following criteria for soil shall, to the maximum extent practicable, be adhered to:

i. Protect the existing soil profile, by minimizing, including cuts, fills, and excavations;

ii. Maintain soil physical properties such as soil texture, consistency, and structure;

iii. Maintain soil chemical properties;

iv. Maintain the natural contour of the land;

v. Retain the existing subsoil depth and thickness;

vi. Keep the soil profile free of gravel, foreign material, and debris;

vii. Keep the bulk density within appropriate levels for plant growth; and

viii. Support practices that maintain organic matter content;

3. The following criteria for water shall, to the maximum extent practicable, be adhered to:

i. Design to maintain existing topography;

ii. Prioritize nutrient management in an avoid-control-trap system;

iii. Prioritize long-term maintenance of water management systems;

- iv. Avoid concentrating flows;
 - v. Avoid creating or disturbing constrained slopes;
 - vi. Employ practices that maintain or increase the infiltration rate of water;
 - vii. Protect flow through natural drainage areas;
 - viii. Minimize impermeable surfaces; and
 - ix. Forest land shall be maintained; and
4. The project design and accompanying narrative for the waiver application shall be completed and certified by a technical service provider, professional engineer, NRCS-certified conservation planner, or other Committee-approved conservation professional.]

Recodify proposed N.J.A.C. 2:76-25A.9 and 25A.10 as **2:76-25A.7 and 25A.8** (No change in text.)

EDUCATION

(a)

**STATE BOARD OF EDUCATION
Regulatory Equivalency and Waiver
Proposed Readoption with Amendments: N.J.A.C.
6A:5**

Authorized By: New Jersey State Board of Education, Kevin Dehmer, Acting Commissioner, Department of Education, Acting Secretary, State Board of Education.

Authority: N.J.S.A. 18A:4-15.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2024-086.

Submit written comments by September 13, 2024, to:

Diane Shoener, Director
Office of the State Board of Education
New Jersey Department of Education
100 Riverview Plaza
PO Box 500
Trenton, New Jersey 08625-0500
Email: chapter5@doe.nj.gov

The agency proposal follows:

Summary

The Department of Education (Department) proposes to readopt N.J.A.C. 6A:5, Regulatory Equivalency and Waiver, with amendments. The rules provide regulatory flexibility for school districts and other institutions regulated by Title 6A of the New Jersey Administrative Code. Pursuant to N.J.S.A. 52:14B-5.1, the chapter was scheduled to expire on October 6, 2024. As the Department submitted this notice of proposal to the Office of Administrative Law prior to that date, the expiration date was extended 180 days to April 4, 2025, pursuant to N.J.S.A. 52:14B-5.1.c(2).

As a part of the response to the call in the early 1990s for regulatory flexibility, the State Board of Education (State Board) adopted new N.J.A.C. 6:3A, Regulatory Equivalency and Waiver, effective July 3, 1995. N.J.A.C. 6:3A was readopted effective June 8, 2000, and then recodified as N.J.A.C. 6A:5, effective July 3, 2000. N.J.A.C. 6A:5 has been readopted three times in 2005, 2010, and 2017.

The rules govern the equivalency and waiver process and provide the opportunity for regulatory flexibility for school districts and most programs regulated by the Department. An equivalency is permission to meet the requirements of a rule through an alternative means selected by the district board of education. A waiver allows a district board of education to avoid compliance with the specific procedures or substantive requirements of a rule for reasons that are educationally, organizationally, and fiscally sound. The rules require a school district’s educational community, including parents, administration, and staff, to be informed of the proposed equivalency or waiver and provided the opportunity to comment.

The equivalency and waiver process cannot be applied to certification requirements pursuant to the purview of the State Board of Examiners or at N.J.A.C. 6A:14, Special Education.

The following summarizes the chapter’s provisions and the proposed amendments. Unless otherwise specified, proposed amendments are to update terms or are for style, clarity, or grammatical improvement.

Subchapter 1. General Provisions

N.J.A.C. 6A:5-1.1 Purpose

This section outlines the chapter’s purpose and scope. The chapter’s purpose is to provide regulatory flexibility through an equivalency or waiver to meet the requirements of a specific rule in the New Jersey Administrative Code, Title 6A, so school districts can provide effective and efficient educational programs. The section outlines the Commissioner’s delegated authority to decide each equivalency and waiver request on a case-by-case basis.

The chapter applies to the following entities: school districts; charter schools; renaissance schools; county vocational school districts; county special services school districts; educational services commissions; jointure commissions; regional day schools; Marie Katzenbach School for the Deaf; approved private schools for students with disabilities (APSSDs); college-operated programs; and programs operated by the State Departments of Children and Families, Human Services, and Corrections. Agencies and clinics are excluded. School districts that contract with private preschool providers or local Head Start agencies must submit the equivalency or waiver application when seeking relief from the requirements at N.J.A.C. 6A:13A, Elements of High-Quality Preschool Programs, that apply to providers or local Head Start agencies.

The Department proposes to amend N.J.A.C. 6A:5-1.1(b) to add that the chapter applies to educator preparation programs, which are Commissioner-approved certificates of eligibility with advanced standing (CEAS) or certificate of eligibility (CE) programs or out-of-State programs that are housed at a higher education institution or other program provider and prepare candidates for instructional, administrative, or educational services certification.

The Department proposes new N.J.A.C. 6A:5-1.1(b)1 to state that “school district” refers to each of the 14 entities referenced at N.J.A.C. 6A:5-1.1(b), unless otherwise indicated.

N.J.A.C. 6A:5-1.2 Definitions

This section defines the terms used in the chapter.

N.J.A.C. 6A:5-1.3 Criteria for an Equivalency or Waiver

This section establishes the required criteria for an equivalency or waiver request to be considered.

The Department proposes new N.J.A.C. 6A:5-1.3(a)1ii to state that no equivalencies or waivers related to N.J.A.C. 6A:14, Special Education, shall be granted. The proposed new regulation mirrors the prohibition in the special education rules at N.J.A.C. 6A:14-4.9(f), which has been in place for nearly 30 years.

The Department proposes new N.J.A.C. 6A:5-1.3(a)1iii to state that the Department shall not accept any equivalency or waiver application that seeks relief from any title of the New Jersey Statutes or any title other than Title 6A of the New Jersey Administrative Code. As the Commissioner does not have the authority to provide relief from the requirements in the State statute or other titles of the New Jersey Administrative Code, the proposed new regulation will improve efficiency in the application process by empowering executive county superintendents to not accept applications that cannot be approved under any circumstance. The Department encourages chief school administrators to discuss the regulatory relief sought and the reason(s) why the equivalency or waiver is needed with the executive county superintendent prior to drafting an application to ensure that relief pursuant to N.J.A.C. 6A:5 is necessary and feasible.

N.J.A.C. 6A:5-1.4 Equivalency Process

This section lists the information that a school district must submit in its equivalency application. The section also requires the chief school administrator to sign the completed equivalency application and for it to be approved by the district board of education.