

STATE AGRICULTURE DEVELOPMENT COMMITTEE (SADC)
SPECIAL MEETING

March 15, 2024

Assistant Secretary of Agriculture Joseph Atchison called the meeting to order at 9:05 a.m.

Ms. Payne read the notice stating that the meeting was being held in compliance with the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq.

Roll call indicated the following:

Members Present

Joseph Atchison, III (Acting Chairman)
Martin Bullock
Scott Ellis
Pete Johnson
Richard Norz
Tiffany Bohlin
Charles Rosen
Lauren Procida
Brian Schilling

Members Absent

Gina Fischetti
Julie Krause

Susan Payne, SADC Executive Director
Alexandra Horn, Esq., Deputy Attorney General

Public Comment

Patricia Springwell from Hunterdon County stated this meeting is to discuss soil protection standards and the committee has an obligation to be stewards of the land and protect fertile soil.

Old Business

A. Soil Protection Standards – published rule proposal

Ms. Payne stated the purpose of this meeting is to review the public comments received and to discuss the recommendations of the SPS subcommittee.

Ms. Payne reminded the committee that they have received copies and a chart of all the

public comments received to date. Included are comments from the following grant recipients: 11 CADBs, one Nonprofit, and one municipality. Ms. Payne reviewed a summary of the comments grouped together by subject categories.

The main subject category of comments received in favor of the draft rule was the importance of protecting soil resources. Subcategories of those comments mentioned the need for soil protection for future agricultural versatility, sustainability, stormwater management, flooding, and climate resiliency. These comments generally urged adoption of the published rule.

Retroactive application of the proposed standards was the main subject category mentioned in the comments received by the agriculture community. Subcategories of those comments stated that preserved farm owners had no expectation of being subject to a rule of this nature and the deed of easement is a contract that cannot be unilaterally changed. Many commentors suggested these rules should apply prospectively only.

Economic viability was another frequent category raised by the farming community. Comments expressed concern on the potential impact to versatility, innovation and expansion of agricultural operations. Some comments stated the rules have an uneven impact on certain ag businesses such as nursey and equine operations. There was also a concern there may be a loss of a preserved farm's asset value.

Taxpayer expectations was a category raised by the general public. Comments stated the current rule reflects the expectations of voters who supported the program throughout the years who believed soil resources would be conserved. Commentors stated the rule is necessary to maintain program integrity with the taxpayers.

The last recurring category among comments received was the possibility of decreased program participation in the future and a loss of trust with the SADC. Commentors believe the rule will have a negative impact on attracting new landowners to the farmland preservation program and expressed concern as to what other rules could be implemented at a later date.

Ms. Payne stated those were the main themes cited in the approximately 275 comments received.

Ms. Payne noted during recent in-person presentations made to county boards of agriculture that she and Mr. Roohr encouraged the submission of specific recommendations for rule changes and alternatives. One common recommendation received suggested the rule only be applicable to farms preserved after the adoption date. Another recommendation was for SADC to take a site-specific stewardship and guidance approach which included the use of BMPs, and the involvement of soil conservation districts to review soil disturbance proposals and provide implementation recommendations. Other comments s noted the deed of easement already contains sufficient authority in the requirements for a farm conservation plan and the agency

should have a stronger mechanism to enforce those plans.

Other suggested alternatives included allowing preserved farms to buy back some or all of their rights, compensate landowners for the additional regulations being placed on their farms after preservation, or “grandfathering” soil disturbance that existed either when it was preserved or at the time of the SPS rule adoption. Another suggestion was to decrease the proposed soil disturbance allocation, as some commentators believe the current allocation is too high and should not apply to the entire farm, but rather only to fertile soil.

Other recommendations were to allow clustering to non-contiguous parcels and among different owners of preserved farmland. It was also suggested to make the waiver process less complicated and expensive and more predictable.

Ms. Payne stated the SPS subcommittee generated recommendations to the committee and has asked Mr. Schilling, who represents Rutgers, to present those recommendations on their behalf.

Mr. Schilling stated he has been a member of the SADC, representing Rutgers, since 2007 and has not seen in his 31-year career in agriculture or the 17 years on this committee an issue as great as the soil protection standards rule.

Mr. Schilling stated the purpose of this rule is to relieve a fundamental tension that exists in the deed of easement where there are several paragraphs that speak to the owner’s obligations and rights pertaining to building agricultural infrastructure and modifying their farm for ag purposes, while avoiding activities that are detrimental to drainage, flood control, water conservation, erosion control or soil conservation.

Mr. Schilling stated ARDA has a two-fold mission: to strengthen the ag industry and to preserve farmland. But, as the Supreme Court noted in its 2018 decision, neither of those objectives are subordinate to the other. The Court stated that while owners of preserved farms are on notice of requirements to conserve the soil, they are left without adequate direction on the tangible constraints on their agricultural use of the land. The decision further stated that persons subject to regulation are entitled to sufficiently definite regulations and standards so that administrative decision making is fair and predictable. The court noted that it is the agency’s responsibility to create regulatory guidelines regarding the scope and nature of excavation and construction activities permitted on a preserved farm based on its administration and enforcement of ARDA and its agricultural expertise. Mr. Schilling expressed concern that if the SADC did not adopt regulations, then who would otherwise do so, and would that outcome be favorable to all parties involved?

Mr. Schilling noted one of the biggest concerns expressed by the ag community is the retroactive application of the rules to landowners already in the farmland preservation program. The most substantial recommendation of the subcommittee is to

“grandfather” existing disturbance so it would not count toward the disturbance limit contained in the rule. Mr. Schilling explained the limit on all farms enrolled in the program would start at 0% at the time of the rule adoption and the cap would be at 12% or 4 acres, whichever is greater. The SADC would use 2023 map imaging as the basis for existing disturbance.

Another recommendation is to delete the production waiver provision. The original intent for this waiver was to provide relief to farms that were at or near the 12% limit. Under the rule as it is written today, there are approximately 49 farms out of 2,902 that are above the proposed permitted limit and approximately 100 farms within 50% of that limit. With the “grandfathering” of existing disturbance, this waiver provision is no longer needed. The elimination of the waiver is also responsive to public comments that obtaining the waiver was too complex.

Mr. Schilling stated there was no change recommended to the proposed disturbance limit of 12% or 4 acres, whichever is greater. However, the subcommittee recommends deleting the current provision for an additional 2% or 1 acre above the existing disturbance, which was intended to benefit farms approaching or over the limit and is unnecessary given the “grandfathering” of existing disturbing and the allowance of the additional 12% or 4 acres.

Regarding the innovation waiver, commentators requested that the SADC consult with outside agencies and experts when reviewing activities proposed by landowners when applying for these waivers. Mr. Schilling stated language would be added to clarify the SADC’s consultation process with outside entities and agencies. Additionally, the requirement of the implementation of a stewardship conservation plan and the public notice to neighboring owners will be deleted. Again, the deletion of these items is the subcommittee’s response to comments stating that obtaining a waiver was too complex.

Lastly, the subcommittee does not recommend any changes to the parameters for the transferring of disturbance currently in the rule and recommends continuing to allow for the transfer of disturbance among contiguous parcels owned by the same entity.

Mr. Schilling stated the agency had preserved approximately 2,902 farms totaling approximately 242,500 acres when it conducted its SPS data research. Of those acres, approximately 3,250 acres are considered disturbance which includes soil alteration, surfacing or compaction, which represents disturbance amounting to 1.3% of all preserved farmland. If you remove the top ten farms with the most disturbance, the percentage drops to 1.1%. It is understood that farms need infrastructure and development for farming purposes, but he said that he does not believe this rule incentivizes overdevelopment by farmers but does provide them the ability to meet their operational needs.

Mr. Rosen stated he has spent a large amount of his career dealing with conservation, environmental stewardship, farming and economic viability. As a public member on

the committee, as a farmer and as an attorney, he feels the committee has done a remarkable job at finding a balanced approach. He recognized the major compromise of the subcommittee recommending the “grandfathering” of existing disturbance and believes it not only provides an adequate allocation to the currently preserved farms, but also continues to make the program attractive to prospective landowners. The agency has the funds for stewardship projects, acquisitions, and to support future farmers and those funds need to be spent or it will be reallocated to other uses. Mr. Rosen expressed an urgency for the SADC to finalize this rule so it can focus on other equally important needs of the ag community.

Mr. Johnson thanked Mr. Schilling for his presentation and urged the committee to take action today. He agrees with the concerns regarding an outside body creating these regulations as well as the loss of funds. He believes these recommendations reflect a good, compromised solution.

Mr. Norz stated he had several questions. He noted the Supreme Court stated there must be a balance between soil conservation and building ag infrastructure. He asked if the subcommittee considered the need for certain agricultural practices to disturb the soil.

Mr. Rosen stated the rule does contemplate that issue and tried to address it in several ways. The first was by calculating the 12% limit based off the total acreage and not just tillable ground. The subcommittee also revised the list of exempt ag practices many times based on comments received during the rule making process. The subcommittee moved from an impervious cover definition to a disturbance definition. Mr. Rosen stated the subcommittee feels a 12% limit in addition to what already exists on already preserved farms is more than adequate to support farming operations. Mr. Rosen added that if this doesn't fit the business objectives of a farmer, they should not preserve their land or buy preserved land.

Mr. Norz agreed that notion applies to all landowners considering preservation after the date of the rule adoption, but he still has concerns for those who preserved their farms over the last 40 years of the program without knowing this rule was coming. Mr. Norz noted ARDA and the judge stated soil conservation and ag infrastructure must be considered equal and he asked if the subcommittee felt they gave equal weight to those two elements and found an acceptable balance between the two. Mr. Norz expressed concern that the rule limits a farmer's ability to expand and restricts most of the land to crop production.

Mr. Rosen stated the subcommittee found the balance by “grandfathering” the existing disturbance and calculating the additional 12% allocation using the total acreage rather than just tillable land. Mr. Norz stated he is uncomfortable classifying agricultural infrastructure the same as other infrastructure as it limits a farmer's ability to expand their operation.

Mr. Norz asked if the subcommittee contemplated the ability for landowners to exercise a buy-back option or to compensate landowners for the perceived value lost as a result of this new rule, as they did not know these new restrictions would be placed on their land. Mr. Rosen stated that farmers do know that this agency has a responsibility to regulate and they voluntarily decided to participate in a publicly funded program. The court has demanded that the agency clearly define what is soil disturbance and what is an acceptable limit.

Mr. Schilling stated he has heard some preserved farm owners say they sold their development rights but did not sell their ability to figure out how they will farm. Mr. Schilling referred to the exemption list and how the list has been modified over the years of drafting the rule. He noted this list continues to be capable of revision as ag practices change in the future.

Mr. Norz asked if the subcommittee considered NRCS projects to count as undisturbed areas. Ms. Payne stated many NRCS practices do not count as disturbance but that it is not possible for the rule to say that any NRCS practice does not count, as some approved projects do disturb the soil. The subcommittee determined which projects would not count based on their impact on the soil. Mr. Roohr also noted that some NRCS practices that require hard infrastructure because of a situation that is outside of the farmer's control, are considered exempt.

Mr. Bullock stated that the rule has come a long way since it was originally proposed nearly ten years ago, and he believes it has come as far as it can go. He believes that a balance has been reached the best it can.

Mr. Norz thanked the committee and the staff for the work they have done but still has concerns regarding the balance between soil and infrastructure and feels it should be 50/50.

The committee decided to hear public comments before taking action.

Public Comment

James Waltman, Hopewell NJ resident and former member of the SADC, stated he served on the committee from January 2008 to April 2023 and was a member of the SPS subcommittee. The proposed rule published in the register was not one he would have preferred, but thought it was a good compromise and needed to be adopted in order to regulate before it was too late. Mr. Waltman stated soil alteration, surfacing and compaction undermine the value and productivity of the soil the public paid to protect, and if the soil on preserved farms is not protected, the program could lose public support. There must be a limit on how much our preserved farmland can be covered with pavement, gravel, buildings and other impervious surfaces, and on other activities such as compaction, grading and cut and fill.

Mr. Waltman stated he is unpleasantly surprised by the recommendation of the subcommittee and, as a former member of the subcommittee, he provided some historical data. The 12% limit was a result of two analyses: the impact of various activities on soil and the extent to which soil was already disturbed by those activities. The 12% allocation was aimed at limiting the damage to soil, but also to ensure there weren't many farmers who exceeded the limit. Mr. Waltman stated if all existing disturbance is going to be grandfathered, the limit should be 8% or less.

Mr. Waltman noted Mr. Schilling read the provisions in the deed of easement and those restrictions have always been there. The committee is trying to determine with greater specificity the definition of those limits as the Supreme Court has required.

Amy Hansen, New Jersey Conservation Foundation, is also an owner of a preserved farm with an impervious cover limit located in Hunterdon County. Ms. Hansen noted there are thousands of acres in NJ that have been preserved with an impervious cover limit to protect the irreplaceable soils that remain viable. She is dismayed about the weakening of the published proposal that allows grandfathering of existing disturbance. Ms. Hansen reminded the committee it opened up the deed of easement to allow cell towers, and then rural microenterprises, and just recently special occasion events such as large-scale weddings and events. These were all commercial rights sold at preservation that were given back to the farmers with no money given back to the public.

Ms. Hansen stated she wishes the rule was stronger and finds it hypocritical for farmers to ask for the deed of easement to allow non-agricultural uses, but do not recognize their responsibility to protect valuable soil. Ms. Hansen urges the committee to oppose the grandfathering of existing disturbance and adopt the proposed rule as published.

Ryck Suydam, farmer in Franklin Twp., Somerset Co., thanked the subcommittee for their work and stated he still has an issue with retroactivity. He recognizes the need to finalize this rule and move forward and if he understood the subcommittee's proposals, he could accept it.

Bill Kibler, Raritan Headwaters Association, stated he gives great credit to farmers who preserve their farms as it benefits the public and the economy. He noted that preservation is not a charitable contribution, as farmers receive compensation, and rightfully so. The grandfathering provisions proposed by the subcommittee should not be approved, as the owners were put on notice at the time of preservation that among their obligations were soil preservation and preserving ag viability. The Supreme Court's decision did not tell this committee to compromise both of those objectives, it told this committee to accomplish both objectives. The current rule already significantly accommodated the existing owners by the list of exemptions and basing the disturbance allocation on the entire farm and not just tillable. The existing rule already meets the needs of the farmers, and although he would like to see a much lower disturbance limit, the proposed rule also meets the needs to protect the soil.

Pete Johnson stated that even with the grandfathering of existing disturbance, the potential soil disturbance under the new proposal would be less than the current published proposal. Ms. Payne confirmed the new proposal removes the production waiver of up to 15% for every farm, which was intended to help farms that were near or above the limit, and as such removes the ability for the additional 3%. If every farm had exercised its full allotment, from 12% to 15%, the resulting overall disturbance would exceed that which the grandfathering allows.

Nicole Voigt, attorney, stated that the Supreme Court decision in Quaker Valley did not deal with a deed of easement requiring a farm conservation plan. The terms of the deed of easement at issue did not include later amendments to the deed requiring farm conservation planning that, according to what the SADC stated at the time of the amendments, were the compliance tool for soil and water conservation projects. Ms. Voigt believes it is important that the Supreme Court's advice to the committee did not address the current form of the deed of easement. Ms. Voigt stated the grandfathering proposal addresses retroactivity to a degree, but there is still a retroactive concern. The new rule will need to be reviewed to get clarity on some points discussed today, such as the innovation waiver and its role in conservation planning and projects. Ms. Voigt also raised concern with definitions of some of the exemptions, such as temporary tents, that contradict other determinations made by the committee.

Pat Butch, preserved farm owner, stated that at the New Jersey Ag Convention a resolution was passed on soil protection and should be considered as part of the public comments. Ms. Butch also noted that greenhouses have not been adequately considered in the proposed rule, their positive effects on climate change and how they provide an ability to grow more food in a smaller space. The committee needs to be open to innovation and changes made to production practices. Ms. Butch expressed concern with the economic fairness whereby farms with current disturbance get an advantage over farms with no disturbance if everyone gets 12%. Ms. Butch also stated she asked very pertinent questions when she preserved her farm and if either one of these proposals are adopted, the agency has broken promises made to her and it casts the agency in a negative light.

Patricia Springwell, resident of Hunterdon County, stated several committee members have mentioned out of the 250,000 acres preserved, there are about 3,000 acres of disturbance. She would prefer to have an extra 3,000 acres of fertile soil to produce food and serve the people. Farmers can be stewards of the land and protect the soil and still make a living. Ms. Springwell stated the taxpayers pay for the preservation of the soil and paid for those 3,000 acres.

Pete Johnson expressed he has similar concerns as raised by Ms. Butch, but believes the proposed rule is a good start and as problems are identified after its implementation, the rule can be revised. However, after ten years, everything that could have been discussed has taken place.

Peter Furey stated this committee was created within the Department of Agriculture because it was meant to benefit the ag industry by identifying viability issues and to preserve land. Farm Bureau views the Supreme Court decision as requiring guidance from the agency and not regulations. Mr. Furey stated Farm Bureau will comment once the new rule is available.

Christina Chrobokowa, 360 EarthWorks, is very interested in how these guidelines will help farmers protect the soil vitality and viability of their farms.

Brian Schilling stated 250,000 acres have been preserved, but asked everyone to consider if that total was zero and try to imagine how many of those acres would be developed or inaccessible to farmers. The 3,250 acres of disturbance are a necessity to the ag industry and are not the same as non-agricultural development. Mr. Schilling stated this program needs flexibility and certainty for the landowners while maintaining integrity in the eyes of the public who support it. However, it is important to note that farmers need to make a living and have a viable business in order to keep those preserved acres in production. Mr. Schilling stated this program is going to continue to evolve, and the rule has the same capabilities as circumstances change in the future.

Mr. Norz thanked the subcommittee and staff for all the time and work that has gone into the drafting of the rule proposal and the changes that have been made throughout that process. He agrees that the rule has come as far as it can for now and needs to be implemented so it can be reviewed as time goes by.

It was moved by Mr. Rosen and seconded by Ms. Bohlin to approve the soil protection standards rule with the proposed amendments and alternatives as proposed by the subcommittee. A roll call was taken. The motion was unanimously approved.

Asst. Secretary Atchison thanked the committee and staff for their dedication and work over the years.

Ms. Payne stated based on the discussion today, staff will revise the proposed rule and aim to bring a new draft to the committee at the next meeting for review, and then bring a final version to the committee at the April meeting for approval to republish in the Register.

ADJOURNMENT

The meeting was adjourned at 11:21a.m.

Respectfully Submitted,



Susan E. Payne, Executive Director
State Agriculture Development Committee