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RULE PROPOSALS

**AGRICULTURE
DIVISION OF AGRICULTURAL AND NATURAL RESOURCES
STATE SOIL CONSERVATION COMMITTEE**

40 N.J.R. 1397(a)

Proposed Amendment: N.J.A.C. 2:90-1.12

[Click here to view Interested Persons Statement](#)

Authorized By: State Soil Conservation Committee and Charles M. Kuperus, Secretary, Department of Agriculture, and Chairman, State Soil Conservation Committee.

Authority: N.J.S.A. 4:24-3 and N.J.S.A. 42.

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

Proposal Number: PRN 2008-88.

Submit comments by May 16, 2008 to:

Jim Sadley
Executive Secretary
State Soil Conservation Committee
PO Box 330
Trenton, NJ 08625-0330
Email: SSCC.rules@ag.state.nj.us

The agency proposal follows:

Summary

The State Soil Conservation Committee is proposing new *N.J.A.C. 2:90-1.12(d)*, pursuant to the Soil Erosion and Sediment Control Act, *N.J.S.A. 4:24-39 et seq.* (P.L. 1975, c. 251). The regulation authorizes that the application fee for soil erosion and sediment control plan certification for this program be submitted to the respective conservation district by a Federal project and shall be made payable to the "Treasurer, State of New Jersey" and deposited by the New Jersey

Department of Agriculture. The fee will be redirected by the Department of Agriculture-State Soil Conservation Committee to the local district to provide compensation for performing plan review and site inspections on the project during construction. Districts rely solely upon user fees to support the program as set forth in the Act. No State budget funds are provided to districts in support of the program.

The State Soil Conservation Committee has administrative responsibility for the promulgation of administrative rules and policies, approval of fees and general oversight of districts who implement the program at the local level. The Act is one of the most important Statewide, non-point pollution control programs for protecting water quality during construction related, land disturbance activities. Annually more than 5,500 private and public construction related land disturbance projects on 30,000 acres of land are regulated by districts.

This regulation establishes a Statewide uniform amendment to the fee schedule utilized by the 15 soil conservation districts applicable to certain Federal projects involving land disturbance. It is recognized that some districts may not have Federal projects that will occur within their jurisdiction. Districts are not land use approval agencies, rather their role under the Act is to reduce the danger from stormwater runoff and to retard non-point pollution from sedimentation and to conserve and protect the land, water, air and other environmental resources of the State. The Act requires that approval of an application for development granted by the State, any county, or municipality where more than 5,000 square feet of land surface area is disturbed shall be conditioned upon certification of a plan for soil erosion and sediment control by the district wherein the soil disturbance occurs. The Act also requires that any project not requiring approval by the State, any county, municipality or instrumentality thereof shall, prior to commencing such project receive certification from the district. The fee schedules of districts are for plan review and site inspections to ensure compliance with the certified plan. The technical basis for the soil erosion and sediment controls utilized on the site are the Standards for Soil Erosion and Sediment Control in New Jersey as promulgated by the State Soil Conservation Committee of the Department.

The Act provides at *N.J.S.A. 4:24-46* that districts shall adopt a fee schedule and collect fees from applicants for the certification of plans and for on-site inspections . . . and such fees shall bear a reasonable relationship to the cost of rendering services. The State Soil Conservation Committee conducted a survey of the 15 districts and their State-approved fee schedules applicable to Federal project activities to serve as the basis for the proposed rule. The Federal fee schedule was adjusted to establish one uniform fee to apply to all districts. Federal officials have stated that they are authorized to make one fee payment per project and in most circumstances, such payment would be adequate. There may be circumstances where a major revision to the original project design may occur and additional district review may be required. Finally, a contractor who fails to implement the controls specified on the certified plan or otherwise remedy erosion problems during construction may be subject to additional inspection fees.

In conjunction with enforcing that Act, each district concurrently implements at the local level, the Stormwater Permitting Program, specifically the Construction General Permit, NJG0088323. This program is pursuant to the Federal Clean Water Act, as noted below. Districts issue Authorizations to Discharge Stormwater (ATD) to all land disturbance activities subject to the Soil Erosion

and Sediment Control Act. The fees submitted by the applicant to the district are made payable to the "Treasurer, State of New Jersey" and processed to the Department. The State Soil Conservation Committee reimburses the respective districts based on the number of permit authorizations each processes to the Department.

The permit program is implemented in close coordination with the Department of Agriculture-State Soil Conservation Committee and in accordance with procedural rules promulgated by the Department of Environmental Protection. This permit is pursuant to the New Jersey Pollution Discharge Eliminating System (NJPDDES) in rules at *N.J.A.C. 7:14A* as a requirement of the Federal Clean Water Act, 33 *U.S.C. §§1251 et seq.*

Districts have performed plan review and site inspections on projects by virtually all applicable private and public entities since inception of the Act in 1976 including Federal projects since 1990. With enactment of section 1323 of the Federal Water Pollution Control Act, each Federal department, agency or instrumentality of the executive, legislative and judicial branches of the Federal government with jurisdiction for property or engaged in activities resulting or that may result in the discharge of pollutants were required to comply with all Federal, State and interstate and local requirements, administrative authority and sanctions respecting the control and abatement of water pollution. That Federal act required the payment of reasonable service charges to the same extent as nongovernmental entities.

Recently Federal officials representing McGuire Air Force Base and other facilities under their jurisdiction believed that their proposed land disturbances were not regulated by the Soil Erosion and Sediment Control Act. Federal officials also noted that the Federal Clean Water Act contained a waiver of sovereign immunity requiring compliance with the State water pollution control statutes and rules for water quality protection. However, they noted the Anti-Deficiency Act, 31 *U.S.C. §§1301, et seq.*, precluded Federal agencies from paying fees to local agencies. Therefore, the basis for this proposal is to provide a clear path for projects subject to the Federal Clean Water Act's waiver of sovereign immunity to allow the payment of fees, where such fees are promulgated; and such role is with and through the State Soil Conservation Committee of the Department. The Federal officials met with and requested that the Departments of Agriculture and Environmental Protection assist in the resolution of this matter since land disturbances are subject to the Soil Erosion and Sediment Control Act; however, this is a Federal project and the Federal entity is not subject to payment of fees under this Act unless such fee schedule is promulgated by rule. At the same time, DEP requires a State Pollutant Discharge Elimination System-Construction General Permit NJG0088323, including for Federal facilities. This general permit is conditioned upon a certification obtained under the Soil Erosion and Sediment Control Act. The mutually agreeable resolution was possible by simplifying the fee schedule for Federal projects with similar areas of disturbance and making the fees Statewide, not local. This rule would be equally applicable to any Federal project.

As the Department has provided 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The proposed amendment will have a positive social impact by protecting water quality through controlling soil erosion and sedimentation relative to construction related land disturbance activities on Federal facilities. The rule will improve coordination and strengthen understanding between the Federal, State and local agencies regarding land disturbance and stormwater impacts on water quality. The quality of life and the environment will be enhanced through the installation of practices that protect the soil, the aquatic habitat and wildlife in streams and downstream water bodies from the sources of sedimentation caused by construction related land disturbances.

Economic Impact

The proposed amendment will have a minor economic impact on Federal projects in that the fee required for the review and inspection of proposed projects would be among the least costs, related to the project. The fee, pursuant to State statute, shall bear a reasonable relationship to the cost for rendering services. The Committee has determined such reasonable relationship with the recent approval by the State Soil Conservation Committee of the Federal fee schedule. It is estimated that less than one quarter of one percent of applications received per year by districts (10 applications or less) will be from Federal facilities.

Federal Standards Statement

Executive Order No. 27 (1994) and *N.J.S.A. 52:14B-1 et seq.* (P.L. 1995, c. 65) require State agencies which adopt, readopt or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The rule proposal does not exceed Federal requirements but allows contractors to meet the intent of the Federal Clean Water Act for protecting water quality. The amendment provides the necessary clarification to satisfy an unambiguous waiver of sovereign immunity as set forth in the Federal Clean Water Act, through the promulgation of a fee for Federal facility projects.

Jobs Impact

The Department does not anticipate any creation or loss of jobs as a result of the proposed amendment.

Agriculture Industry Impact

Pursuant to the Department's analysis of impacts as required at *N.J.S.A. 52:14B-4* the Department does not expect the proposed amendment to have any impact upon the industry of agriculture.

Regulatory Flexibility Analysis

The proposed amendment has been reviewed for compliance with the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16 et seq.* The rule applies to the applicant, that is, the Federal government that would employ contractors, the vast majority of whom are considered small businesses as defined by the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16 et seq.* The costs for implementing erosion controls is integral to the land development process, protection of offsite property and protecting water quality. The professional services required to develop plans for certification by the district are primarily professional engineers. The

costs will vary according to the size and scope of the project. The reporting, recordkeeping and other compliance requirements include the requirement to apply for and obtain erosion control plan certification and the construction general permit; maintain the certified plan on site until the completion of final stabilization, maintain records on the installation of practices and identify compliance and non-compliance to satisfy the stormwater permit requirements. All reporting and recordkeeping requirements are applied equally to projects of any size and to all public or private entities. Compliance by all projects, as defined in the Act, without exception has been determined to be necessary because similar negative environmental impacts may result from any land development activity.

Smart Growth Impact

The proposed amendment will have no impact upon the achievement of smart growth or upon the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface **thus**):

2:90-1.12 Fees

(a)-(c) (No change.)

(d) Fee for certain Federal projects: Certain Federal project activities that are precluded from making fee payments directly to a district, based upon applicable Federal and State laws, shall remit fees payable to "Treasurer, State of New Jersey" to the local district in which the project is to be undertaken. The fee shall be submitted in conjunction with the plan for soil erosion and sediment control certification. The fee shall be in accordance with the following fee schedule based on the land surface area to be disturbed:

Federal Project Fee Schedule

Disturbance Area*	Review Fee**	Inspection Fee***
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1 to 5 acres	\$ 950.00	\$ 325.00 per acre
6 to 10 acres	\$ 1,600	\$ 260.00 per acre
11 to 25 acres	\$ 2,300	\$ 200.00 per acre
26 to 50 acres	\$ 3,000	\$ 180.00 per acre
50.01 acres and greater	\$ 3,500	\$ 160.00 per acre

*For projects greater than one acre, partial acres are to be rounded to the nearest whole acre.

**Major revisions to a previously certified plan are subject to 1/2 the original review fee.

***Reinspection Fee: A fee of \$ 150.00 may be assessed (a) when the contractor has failed to provide the district with a 48 hour advance written notice of the start of construction, or (b) when the second or subsequent district inspection was conducted and there was a failure to address the same problem identified in the first written notice of non-compliance issued to the applicant/contractor, or (c) when the contractor requested an inspection for receiving a Report of Compliance and such district inspection was performed, but the site was not in compliance with the certified plan and the Standards. A copy of all written violation notices shall be issued to the contractor with a copy provided to the local controlling Federal agency.