

Express Terms

Part 325

Glyphosate prohibition and exemption on state property

6 NYCRR Part 325 is amended to read as follows:

Section 325.1 through Section 325.41 remain unchanged.

A new section 325.42 is added to read as follow:

Section 325.42-Glyphosate use on state property

(a) Definitions. As used in this section, the following terms have the following meanings:

(1) “Contractor” means any person that agrees to conduct work under the terms of a contract with a state department, state agency, or public benefit corporation.

(2) “Critical infrastructure” means systems, assets, places, environmental resources, or things so vital to the State that the disruption, incapacitation or destruction of such systems, assets, places, or environmental resources, could jeopardize the health, safety, welfare, or security of the State, its residents, its environment, or its economy.

(3) “Critical native plant species” means any plant species identified by the New York State Natural Heritage Program under Environmental Conservation Law Section 11-0539 with a subnational ranking as critically imperiled, imperiled, or vulnerable; or any plant species identified as endangered, threatened, or rare in 6 NYCRR Section 193.3 under Environmental Conservation Law Section 09-1503; or as identified by the Department.

(4) “Ecosystem” means a dynamic complex of plant, animal, and microorganism communities and the nonliving environment, interacting as a functional unit.

(5) “Ecosystem health” means the ability of the ecosystem to be stable or resilient to stress primarily caused by human activities.

(6) “Habitat” means the environment in which a plant, animal, or other organism lives and grows.

(7) “Invasive species” means any species identified under Environmental Conservation Law Section 9-1709 or as identified by the Department.

(8) “Location” means the physical address of the property on which the pesticide is applied or, if a specific physical address does not exist a description of the application area including street names, county, municipality, zip code, and other identifying features.

(9) “Noxious plant” means any plant that can directly or indirectly injure or cause damage to natural resources or the environment.

(10) “Pests of significant public health importance” means any pest recognized as a pest of concern to a local, state, or federal public health program or the Department; for example, Giant Hogweed, Poison Ivy, and ticks.

(11) “Public benefit corporation” means a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof.

(12) “State agency” means any executive or regulatory body of New York State designated as an agency.

(13) “State department” means any state agency designated as a “department” by name.

(14) “State property” means any New York State-owned real property operated by a state department, state agency, or public benefit corporation, including only surface waters of the State that are fully contained within

the boundaries of New York State-owned real property operated by a state department, state agency, or public benefit corporation.

(15) “Subcontractor” means any person that agrees to conduct work under the terms of a contract for a contractor hired by a state department, state agency, or public benefit corporation.

(16) “Target area” means a general description of the area where the pesticide application is anticipated to occur.

(b) Requirements: As provided in subdivision 12 of Environmental Conservation Law Section 33-1301, any state department, state agency, public benefit corporation, contractor, or subcontractor may only apply glyphosate on state property if the state department, state agency or public benefit corporation demonstrates that all of the conditions in paragraphs one through five of this subdivision are met prior to such application.

(1) The state department, state agency or public benefit corporation must document that the application is necessary for one of the uses listed in subparagraphs 325.42(b)(1)(i) through (iv) below:

(i) to maintain critical infrastructure;

(ii) to maintain roadside vegetation to ensure public safety;

(iii) to manage habitat for one of the following purposes listed in clauses 325.42(b)(1)(iii)‘a’ through ‘d’ below:

(‘a’) control invasive species:

(‘b’) control pests of significant public health importance;

(‘c’) control noxious plants injurious to ecosystem health; or

(‘d’) protect critical native plant species; or

(iv) conduct research into the environmental motility of glyphosate or to develop suitable alternatives to glyphosate for agricultural and environmental uses.

(2) The state department, state agency, or public benefit corporation must develop a human exposure assessment documenting that there will be no actual or significant threat of direct human exposure to glyphosate. This human exposure assessment must address:

(i) Potential settings and pathways of exposure to glyphosate for pesticide applicators, on-site workers, and the public;

(ii) Procedures used to prevent direct human exposures to glyphosate including:

(‘a’) Following precautionary statements contained in the pesticide label directions; and

(‘b’) Implementing site-specific human exposure precautions warranted for the specific application. Site specific human exposure precautions may include the use of visual markers, barriers, or other means to prevent human exposure to glyphosate; and

(iii) An update to the human exposure assessment, prior to the application of glyphosate, if any conditions of the human exposure assessment are modified.

(3) Any person that applies glyphosate on state property for or on behalf of a state department, state agency, or public benefit corporation must apply glyphosate in accordance with the procedures described in the human exposure assessment developed by the state department, state agency, or public benefit corporation for which or on whose behalf glyphosate is being applied.

(4) The state department, state agency or public benefit corporation must develop a glyphosate alternatives analysis demonstrating that there are no effective and practicable alternatives to the use of glyphosate. This

glyphosate alternatives analysis must address, at a minimum, the following factors related to using glyphosate and its alternatives:

- (i) a description of costs;
- (ii) resource requirements for pest control;
- (iii) availability of pesticide products;
- (iv) toxicity to humans and non-target organisms;
- (v) environmental effects; and
- (vi) an update to the glyphosate alternatives analysis, prior to the application of glyphosate, when any of the conditions of the glyphosate alternative assessment are modified.

(5) Any person that applies glyphosate on state property for or on behalf of a state department, state agency, or public benefit corporation must apply glyphosate in accordance with the glyphosate alternative analysis developed by the state department, state agency, or public benefit corporation for which or on whose behalf glyphosate is being applied.

(c) Documentation. A state department, state agency, or public benefit corporation seeking to apply or hire a contractor or subcontractor to apply glyphosate on state property, must document prior to the application that all the conditions in subdivision 325.42(b) are met.

(1) This documentation must include the following information:

- (i) the planned date(s) or date range of the application(s);
- (ii) the justification(s) for the application as required by paragraph 325.42(b)(1);
- (iii) a description of the target area(s);

(iv) the target pest(s);

(v) the human exposure assessment as required by paragraph 325.42(b)(2); and

(vi) the glyphosate alternatives analysis as required by paragraph 325.42(b)(4).

(2) This documentation must be kept for a minimum of three years following the date(s) of the application(s) and must be available for inspection upon request by the department.

(d) Reporting. When glyphosate is applied to state property, the state department, state agency, or public benefit corporation must send an annual glyphosate use report to the department by January 15 for the prior calendar year.

(1) This report must be in a digital or electronic format established or accepted by the department and include the following information:

(i) official name of the state department, state agency, or public benefit corporation;

(ii) pesticide agency or pesticide business registration number, if applicable;

(iii) pesticide product name;

(iv) the United States Environmental Protection Agency registration number of the pesticide product;

(v) amount of pesticide product applied; and

(vi) location of application.

(2) A copy of this report must be kept for a minimum of three years following the date(s) of the application(s) and must be available for inspection upon request by the department.

**Summary of Assessment of Public Comments Received from June 8, 2022 to
August 22, 2022 on the NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION'S
Proposed 6 NYCRR PART 325.42 Regulation
March--2023**

The New York State Department of Environmental Conservation (DEC) proposed a rulemaking in response to the addition of subdivision 12 to Section 33-1301 of the Environmental Conservation Law (ECL). This addition to the ECL prohibits the application of glyphosate on state property by state departments, state agencies, public benefit corporations, and their contractors and subcontractors unless allowed by an exemption specified in the Law.

This proposed rulemaking adds 6 NYCRR Section 325.42 which addresses the prohibition and exemptions from prohibition of glyphosate use on state properties and also requires state departments, state agencies, and public benefit corporations to report their glyphosate use on state properties to DEC.

Public comments were received from June 8, 2022 through August 22, 2022. A virtual public hearing was held on August 17, 2022.

General Comments:

Several comments were in favor of the proposed regulation to prohibit the use of glyphosate on state property while continuing to allow the use of glyphosate to control invasive plants and insects. These comments have been noted and support the proposed regulation.

Several comments stated that the proposed regulation to ban the use of glyphosate on state property by state departments, state agencies, public benefit corporations, and their contractors and subcontractors should be expanded to include all farmland on New York State property, completely ban all uses, or further limit the use of glyphosate in New York State.

The proposed regulation was developed to provide the structure to ensure compliance with the provisions of subdivision 12 of ECL Section 33-1301, which only relates to the use of glyphosate on state property. DEC does not intend to expand the scope of this proposed regulation beyond the use of glyphosate on state property as required by the statutory provisions.

Comments 6 NYCRR 325.42(a):

One commentor requested that DEC expand the definition of invasive species in the proposed regulation. DEC was looking to provide the most flexibility associated with the identification of invasive species possible and believes that Article 9 title 17 of the ECL provides the greatest flexibility to comply with the proposed regulation.

A commentor asked how DEC will identify invasive species when the proposed regulation refers to “as identified by the Department.” The process to make non-listed invasive species determinations for this proposed regulation still needs to be developed by DEC’s Bureau of Pesticides Management and Bureau of Invasive Species and Ecosystem Health. The process will likely involve the use of existing resources available to DEC which may include the use of DEC

staff, partner organizations with expertise, federal resources, New York iMapInvasives, and other invasive species regulations.

Comments were received regarding the definition of location in the proposed regulation. Several commentors claimed that this definition is impractical for this regulation since the exact location of the target species or specific address may not be known in advance of the application which will make it extremely difficult to meet the location requirement of subparagraph 325.42(c)(1)(iii).

To address these comments subparagraph 325.42(c)(1)(iii) in the proposed regulation will be amended from “the application location(s)” to “a description of the target area(s).” This amendment will allow treatment locations to be described in general terms for subparagraph 325.42(c)(1)(iii) which will provide greater flexibility for invasive species control during the development of the documentation required in subdivision 325.42(c). The term “target area” will be added to the definitions in subdivision 325.42(a). However, the definition of the term “location” will remain as is in the proposed rulemaking for reporting purposes.

A comment was received regarding the regulatory impact statement (RIS) which indicates that easements would be considered “state property.” The commentor considers the RIS to be in conflict with the definition of state property in the regulation and recommends that “easements” be removed from the RIS.

It was determined by DEC that owned in fee rights-of-ways and owned in fee easements are considered state property for the purpose of this regulation. Owned in fee is a type of ownership

that provides complete control over a piece of property; therefore, since state departments, state agencies, and public benefit corporations have complete control and ownership of the property DEC will view owned in fee rights-of-ways and owned in fee easements as meeting the definition of state property for this regulation.

A comment was received requesting that DEC consider adding “pesticide applicator” to paragraph 325.42(a)(1), paragraph 325.42(a)(15), and subdivision 325.42(b). Any person applying glyphosate under this regulation would be considered a pesticide applicator. DEC believes that there is no need to specifically mention contractors or subcontractors as pesticide applicators in the regulation.

A comment was received requesting additional information be placed in the RIS regarding health effects from the application of glyphosate. The RIS for this proposed regulation provided information related to health concerns and the United States Environmental Protection Agency’s interim decision associated with glyphosate. The RIS was not intended to provide a complete description of the health effects related to glyphosate, which is well beyond the scope of this proposed regulation.

A commentor wanted it to be recognized that there will be a cost to contractors and subcontractors, the state, and taxpayers to implement this proposed regulation. DEC recognized in the RIS that to enact this statute and the regulation would increase costs for state departments, state agencies, and public benefit corporations. The intent of the regulation is to place the onus on the state department, state agency, or the public benefit corporation to determine that

glyphosate pesticide products are acceptable for use on state property and not upon contractors or subcontractors to bear the costs.

Comments 6 NYCRR 325.42(b)

A comment inquired as to which state agency's glyphosate use determination a contractor or subcontractor needs to follow when a glyphosate application occurs on state property that is not under the control of the contracting state agency.

A glyphosate use determination is not mentioned in the proposed regulation; however, DEC speculates that the commentor is referring to the three items required by the proposed regulation which includes documentation that the application is necessary for one of the uses listed in subparagraphs 325.42(b)(1)(i) through (iv), the human exposure assessment, and the glyphosate alternative analysis. It is the state department's, state agency's, or public benefit corporation's responsibility to meet the requirements of the regulation and retain the required documentation. The contractor or subcontractor must operate according to the conditions set forth in the contracting state department's, state agency's, or public benefit corporation's documents.

A comment was made requesting a definition for no actual or significant threat of direct human exposure in paragraph 325.42(b)(2) of the proposed regulation. DEC considered this request and it was recognized that a definition or quantifiable measure for this requirement would not be possible for DEC to establish for every application scenario by each state department, state agency, or public benefit corporation applying glyphosate. The conditions that may be necessary

to protect people from glyphosate exposure are specific to the application types and possibly locations.

A commentor suggested that the use of glyphosate in accordance with the label directions is the standard to reduce or eliminate actual or significant threat of direct human exposure. This commentor considers that through pesticide label development and approval process the pesticide label is sufficient to serve as the human exposure assessment in the regulation. It is the state department's, state agency's, or public benefit corporation's responsibility to have a written human exposure assessment which must include conditions on how the label requirements will be met for the specific application type to protect people from exposure.

A comment was received that without a regulatory standard to measure human exposure there could be numerous versions of the human exposure assessment. This commentor also mentioned that each state department, state agency, or public benefit corporation may not have the expertise and resources to create these assessments.

DEC recognizes and expects that there would be multiple versions of the human exposure assessment since they will be specific to the state department, state agency, or public benefit corporation based upon application type and location. If a state department, state agency, or public benefit corporation does not have the expertise or resources to create this assessment as required by the regulation they should not apply glyphosate products on state property as they would not be able to comply with the statutory requirement in ECL 33-1301.

A commentor suggested that the human exposure assessment could be provided on a system wide basis when the effects, setting, and pathways of exposure do not change. The human exposure assessment depends on the type of application that will occur. If the type of application remains the same and the human exposure assessment can be developed to consider the scenarios in which humans may be exposed to glyphosate, the assessment can be developed on a system wide basis.

A commentor requested that DEC place a specific allowance in the regulation for gas and electric infrastructure vegetation management to ensure public safety into the regulation. DEC recognized that identifying and listing each type of critical infrastructure was impractical. Critical infrastructure was purposely defined broadly to allow for a wide range of coverage by this definition. DEC is choosing not to place a specific allowance for gas and electric infrastructure into the regulation.

A commentor asked for clarification associated with 6 NYCRR 325.42(b)(4)(vi). The commentor believes that the wording of this item should be clarified to further define the intention of “any” conditions and “modified.” Furthermore, the commentor believes that the regulation in both paragraphs 325.42(b)(2) and 325.42(b)(4) do not mandate the development of conditions or define what a condition is in the human exposure assessment or the glyphosate alternative analysis. The commentor also requested an amendment to subparagraph 325.43(b)(4)(iv) to indicate that an update to the glyphosate alternative analysis is only required when the criteria are modified to change the conclusions of the analysis.

The term “condition” referred to in the regulation describes the items addressed in the human exposure assessment and glyphosate alternative analysis. The term “condition” is synonymous with “specifications” or “requirements” and describes the information placed in the human exposure assessment and glyphosate alternative analysis to justify applying glyphosate according to the statute and regulation. DEC considers the term “conditions” as appropriate for these requirements and it will remain in the regulations. As for the commentor’s request, the glyphosate alternatives analysis must be updated whenever there are deviations from the conditions in the glyphosate alternative analysis and not only those that change the conclusion of the analysis.

A commentor suggested that the glyphosate alternative analysis could be provided on a system wide basis. The glyphosate alternative analysis depends on the type of application that will occur. If the type of application remains the same the glyphosate alternative analysis can be developed to consider system wide scenarios in which glyphosate is acceptable to be used.

Comments 6 NYCRR 325.42(c):

A comment was received concerning the ability to plan application dates prior to application as required by subparagraph 325.42(c)(1)(i) based upon weather and other factors. Subparagraph

325.42(c)(1)(i) allows for individual date, dates, or a date range to be documented prior to application.

**Assessment of Public Comments Received from June 8, 2022 to August 22,
2022 on the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION'S
Proposed 6 NYCRR PART 325.42 Regulation
March---2023**

In June 2022, the New York State Department of Environmental Conservation (DEC) proposed a rulemaking in response to the addition of subdivision 12 to Section 33-1301 of the Environmental Conservation Law (ECL). This addition to the ECL prohibits the application of glyphosate on state property by state departments, state agencies, public benefit corporations, and their contractors and subcontractors unless allowed by an exemption specified in the Law.

This proposed rulemaking adds 6 NYCRR Section 325.42 which addresses the prohibition and exemptions from prohibition of glyphosate use by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. This proposed regulation will also require state departments, state agencies, and public benefit corporations to report their glyphosate use on state properties to DEC. In addition, DEC is required to post information on its website regarding glyphosate usage by state departments, state agencies, public benefit corporations, or their contractors or subcontractors on state property by April first of each year.

Notice of the proposed rulemaking appeared in the June 8, 2022 State Register as well as in the DEC's Environmental Notice Bulletin. Public comments were received from June 8, 2022 through August 22, 2022. A virtual public hearing was held on August 17, 2022. This Assessment of Public Comments responds to all substantive comments received during the public comment period, including written comments. Comments received were compiled, reviewed, and categorized based on their content. All commentors were assigned a commentor number as represented in the table at the end of this document.

General Comments:

Comment 1: Several comments were in favor of the proposed regulation to prohibit the use of glyphosate on State property while continuing to allow the use of glyphosate to control invasive plants and insects.

(Commentor 1,5)

Response to comment 1: Your comment has been noted and supports the proposed regulation.

Comment 2: Several comments stated that the proposed regulation to ban the use of glyphosate on state property by state departments, state agencies, public benefit corporations, and their

contractors and subcontractors should be expanded to include all farmland on New York State property, completely ban all uses, or further limit the use of glyphosate in New York State.

(Commentors 1,2,3,4,8)

Response to comment 2: The proposed regulation was developed to provide the structure to ensure compliance with the provisions of subdivision 12 of ECL Section 33-1301. This subdivision relates only to the use of glyphosate on state property by state departments, state agencies, public benefit corporations, and their contractors and subcontractors and is not applicable to pesticide applicators or businesses that do not meet the parameters of this subdivision. Therefore, DEC does not intend to expand the scope of this proposed regulation beyond the use of glyphosate on state property by state departments, state agencies, public benefit corporations, and their contractors and subcontractors because it is not required by or consistent with the statutory provisions.

Comments 6 NYCRR 325.42(a):

Comment 3: One commentor requested that DEC expand the definition of invasive species in the proposed regulation. The definition of “invasive species” in the proposed regulation is “*any species identified under Environmental Conservation Law Section 9-1709 or as identified by the Department.*” The commentor suggested using the DEC and the NYS Adirondack Park Agency’s definition of invasive species in the “Inter-Agency Guidelines for Implementing Best Management Practices to Control Invasive Species on DEC Administered Lands of the Adirondack Park” which is “A species that is nonnative to the ecosystem under consideration and whose introduction causes or is likely to cause economic or environmental harm or harm to human health.” The commentor also proposed adding the 6 NYCRR 575.3 and 575.4 regulations to identify invasive species, as well as New York iMapInvasives.

(Commentor 5)

Response to comment 3: DEC recognized the need to combat invasive species and during the development of this proposed regulation was looking to provide the most flexibility associated with the identification of invasive species possible. The early detection and control of invasive species is fundamental to DEC’s mission. While all of the options identified by the commentor identify tools that can be used to define invasive species, upon consultation with DEC’s Bureau of Invasive Species and Ecosystem Health it was determined that Article 9 title 17 of the ECL provides greater flexibility than 6 NYCRR 575.3 and 575.4. ECL Article 9 title 17 is the statute from which sections 575.3 and 575.4 are derived and specifies the manner in which invasive species may be identified by DEC. In addition, the proposed regulation allows DEC to declare other species as invasive species based upon sections of the ECL and regulations providing additional flexibility. Furthermore, referring to a New York iMapInvasives in the regulation is not practical as it is not codified. Additionally, referring to a constantly evolving New York iMapInvasives is not consistent with the New York rulemaking incorporation by reference principles.

Comment 4: A commentor asked how DEC will identify invasive species when the proposed regulation refers to “as identified by the Department.”

(Commentor 5)

Response to comment 4: Even though a regulatory pathway exists to recognize and list invasive species there may be the need to recognize a species as invasive faster than the regulatory process allows for rapid control. To recognize non-listed invasive species, it was necessary to incorporate “as identified by the Department” into the proposed regulation. The process to make non-listed invasive species determinations for this proposed regulation still needs to be developed by DEC’s Bureau of Pesticides Management and Bureau of Invasive Species and Ecosystem Health. The process will likely involve the use of existing resources available to DEC which may include the use of DEC staff, partner organizations with expertise, federal resources, New York iMapInvasives, and other invasive species regulations.

Comment 5: Comments were received regarding the definition of location in the proposed regulation. The definition of “location” in the proposed regulation is “*the physical address of the property on which the pesticide is applied or, if a specific physical address does not exist a description of the application area including street names, county, municipality, zip code, and other identifying features.*” Several commentors claimed that this definition is impractical for this regulation since the exact location of the target species or specific address may not be known in advance of the application which will make it extremely difficult to meet the location requirement of subparagraph 325.42(c)(1)(iii). Commentors recommended that the application location documentation requirement be flexible enough to allow treatments to take place in general areas. A commentor also recommended that specific site locations be reported individually through the annual commercial applicator reporting requirement.

(Commentor 5, 6)

Response to comment 5: To address these comments subparagraph 325.42(c)(1)(iii) in the proposed regulation will be amended from “the application location(s)” to “a description of the target area(s).” This amendment will allow treatment locations to be described in general terms for subparagraph 325.42(c)(1)(iii) which will provide greater flexibility for invasive species control during the development of the documentation required in subdivision 325.42(c). The term “target area” will be added to the definitions in subdivision 325.42(a) and will be defined in the regulation as “*a general description of the area where the pesticide application is anticipated to occur.*” For example, the descriptions can include New York State Department of Transportation rights-of ways, New York State Parks, New York State Department of Environmental Conservation lands, or may be more specific.

However, the definition of the term “location” will remain as is in the proposed rulemaking for the purposes of the required reporting of the location of application under subparagraph 325.42(d)(1)(vi). The annual commercial pesticide applicator reporting required by ECL Article 33 Title 12 is a different section of the ECL and is not applicable to the reporting required by the proposed regulation as it is not state agency, state department, or public benefit corporation specific. The reporting of location of application by state agencies, state departments and public benefit corporations is necessary for DEC to post this information on the website to meet the requirements of subdivision 12 of ECL Section 33-1301.

Comment 6: A comment was received regarding item 3 in the Regulatory Impact Statement (RIS) which indicates that easements would be considered “state property”. The commentator considers the RIS to be in conflict with the definition of state property in the regulation and recommends that “easements” be removed from the following sentence in the RIS to be consistent with the definition of State Property in the regulation: “The Department considers state owned in fee rights-of-way and easements to be state property under this definition. ”

The commentator went on to explain that State highway rights-of-way (ROW) have been acquired from various mechanisms and are not all owned in fee by the State of New York and some of the highway ROWs have been acquired from early settlement and are based on the adjacent landowner “owning” to the center of the road with the ROW established for the highway use. The commentator suggested that while New York State has full rights to use the ROW for the highway purposes, the interpretation of this is not owned-in-fee ROW.

This commentator also speculated that non-State premises within ECL Section 33-0905 presents inconsistencies with other laws and within programs with the same responsibilities applied to maintain functional responsibilities and operational requirements regardless of in-fee ownership.

A second commentator questioned whether state departments, state agencies, or public benefit corporations that hold a right-of-way or easement on private property, or a private entity holds a right-of-way or easement on state-owned property are both exempt from this regulation based upon the definition of state property. The commentator requested that DEC clarify in the RIS that the intent of this regulation is not to regulate private property on which the state may hold a right-of-way or an easement or state-owned property on which a private entity holds a right-of-way or easement.

(Commentor 6 and 7)

Response to Comment 6: The definition of “State property” in the proposed regulation is “*any New York State-owned real property operated by a state department, state agency, or public benefit corporation, including only surface waters of the State that are fully contained within the boundaries of New York State-owned real property operated by a state department, state agency, or public benefit corporation.*” It was determined by DEC that owned in fee rights-of-ways and owned in fee easements are considered state property for the purpose of this regulation. Owned in fee is a type of ownership that provides complete control over a piece of property; therefore, since state departments, state agencies, and public benefit corporations have complete control and ownership of the property DEC will view owned in fee rights-of-ways and owned in fee easements as meeting the definition of state property for this regulation. The reference to New York State owned in fee rights-of-ways and New York State owned in fee easements in the RIS as “state property” is consistent with the definition in the regulation and DEC does not intend to modify this section of the RIS.

Although New York State owned in fee rights-of-ways and New York State owned in fee easements are covered by subdivision 12 to Section 33-1301 and this regulation, there are circumstances where this regulation does not apply on rights of ways and easements. For

example, privately owned rights of ways and easements, that are not owned in fee by a state department, state agency, or public benefit corporation, where state departments, state agencies, public benefit corporations or their contractors or subcontractors apply glyphosate pesticide products are not considered state property and accordingly are not subject to this regulation. Furthermore, glyphosate pesticide product application on state property that is conducted by someone other than a state department, state agency, public benefit corporation or their contractor or subcontractor are also not subject to this regulation. In addition, a commentor also mentioned that this regulation is not consistent with DEC's interpretation of ECL section 33-0905; however, the commentor did not elaborate on the nature of this inconsistency. Even though the specific inconsistency was not identified, DEC reviewed ECL section 33-0905 and the regulation and did not find any inconsistencies between them.

Comment 7: A comment was received requesting that DEC consider adding "pesticide applicator" to paragraph 325.42(a)(1), paragraph 325.42(a)(15), and subdivision 325.42(b) to explicitly state that only contractors and subcontractors that are pesticide applicators are covered by the final rule.

(Commentor 7)

Response to comment 7: The regulation only applies to glyphosate applications on state property by state departments, state agencies, and public benefit corporations or their contractors or subcontractors. Any person applying glyphosate under this regulation would be considered a pesticide applicator, including those employed by state departments, state agencies, and public benefit corporations, pursuant to ECL Article 33. Therefore, DEC believes that there is no need to specifically mention contractors or subcontractors as pesticide applicators in the regulation.

Comment 8: A comment was received regarding the "Needs and Benefits" section of the RIS. The commentor requested additional information regarding health effects and concerns from the application of glyphosate when used in approved herbicide applications so the public and the affected state departments, state agencies, and public benefit corporations can fully understand the implications and need for this proposed regulation.

(Commentor 6)

Response to comment 8: The RIS for this proposed regulation provided information related to the World Health Organization's health concerns about glyphosate and the United States Environmental Protection Agency's interim decision associated with this pesticide. However, the RIS was not intended to provide a complete description of the health effects related to glyphosate, which is well beyond the scope of this proposed regulation. The proposed regulation is only intended to provide the structure to ensure compliance with the provisions of subdivision 12 of ECL Section 33-1301. The RIS was not intended to create a foundation to support the law. Therefore, this section will not be modified.

Comment 9: A comment was received about the “costs” section of the RIS. The commentor wanted it to be recognized that there will be a cost to contractors and subcontractors, the state, and taxpayers to implement this proposed regulation. These costs may increase based upon the need for alternative herbicides, treatment measures, additional reporting, and documentation. In addition, the commentor also mentioned that contractors may also decline to bid on contracts that require herbicide applications due to the increased restrictions and recordkeeping.

(Commentor 6)

Response to comment 9: DEC recognized in the RIS that to enact this statute and the regulation would increase costs for state departments, state agencies, and public benefit corporations for many of the reasons described in the comment. The intent of the regulation is to place the onus on the state department, state agency, or the public benefit corporation to determine that glyphosate pesticide products are acceptable for use on state property. This responsibility lies with the state department, state agency, or public benefit corporation to document the justification to support the use of glyphosate pesticide products through the glyphosate alternative analysis, human exposure assessment, records, and reports. The regulation does not require contractors or subcontractors to create any of these documents but requires them to follow the parameters set forth by the agencies. Furthermore, it is anticipated that contractors will pass on any additional costs to the contracting state department, state agency, or public benefit corporation and not bear the cost increase themselves. During the preliminary outreach for this regulation DEC did not receive significant input from contractors making these claims and there was no indication that contractors would decline to bid on herbicide applications for state departments, state agencies, or public benefit corporations based upon the requirements of this statute and regulation.

Comments 6 NYCRR 325.42(b):

Comment 10: A comment inquired as to which state agency’s glyphosate use determination a contractor or subcontractor needs to follow when a glyphosate application occurs on state property that is not under the control of the contracting state agency. The commentor also asked if the contractor or subcontractor must create their own glyphosate use determination in this situation.

(Commentor 5)

Response to comment 10: A glyphosate use determination is not mentioned in the proposed regulation; however, DEC speculates that the commentor is referring to the three items required by the proposed regulation for state departments, state agencies, public benefit corporations, and their contractors and subcontractors to apply glyphosate on state property. These requirements include documentation that the application is necessary for one of the uses listed in subparagraphs 325.42(b)(1)(i) through (iv), the human exposure assessment, and the glyphosate alternative analysis. These requirements correspond with the provisions of the statute. Prior to the application of glyphosate on state property by state departments, state agencies, public benefit corporations, their contractors and subcontractors it is the state department’s, state agency’s, or public benefit corporation’s responsibility to meet the requirements of the regulation

and retain the required documentation, including information required in subparagraphs 325.42(b)(1) (i) through (iv), the human exposure assessment, and the glyphosate alternative analysis. However, the contractor or subcontractor is required to follow the conditions set forth in these documents as required by the proposed regulation in paragraphs 325.42(b)(3) and (5).

The contractor or subcontractor must operate according to the contracting state department's, state agency's, or public benefit corporation's requirements including information developed in accordance with subparagraphs 325.42(b)(1)(i) through (iv), the human exposure assessment, and the glyphosate alternative analysis. The definition of "contractor" in the proposed regulation is *"any person that agrees to conduct work under the terms of a contract with a state department, state agency, or public benefit corporation."* The effective date of the subdivision 12 of ECL Section 33-1301 was December 31, 2021 and applies to any contracts entered into after that date. Since this will be a contracting requirement, based upon the definition of contractor in the proposed regulations, the contractor or subcontractor is agreeing to conduct work pursuant to the terms of the contract and is conducting work on behalf of the contracting state department, state agency, or public benefit corporation. Therefore, the contractor or subcontractor is required to follow the contracting agency's prerequisites and not the requirements of the state department, state agency, or public benefit corporation that controls the state property.

Comment 11: A comment was made regarding paragraph 325.42(b)(2) in the proposed regulation. This provision requires the state department, state agency, or public benefit corporation to develop a human exposure assessment documenting that there will be no actual or significant threat of direct human exposure to glyphosate. This commentor requested clarification concerning the requirement of no actual or significant threat of direct human exposure. This request was to define what was meant by no actual or significant threat or provide a quantifiable measure for this requirement.

(Commentor 6)

Response to comment 11: DEC considered this request and recognizes that the requirement for applications to pose no actual or significant threat of direct human exposure is one of the most challenging aspects of this statute and regulation since an assessment of direct human exposure is specific to the type of application and, in some cases, site-specific characteristics as well. Upon consideration it was recognized that a definition or quantifiable measure for this requirement would not be possible for DEC to establish for every application scenario by each state department, state agency, or public benefit corporation applying glyphosate. The human exposure assessment should identify the potential for direct human exposure from a proposed glyphosate application and identify reasonable procedures that can be implemented to prevent such exposures. The conditions that may be necessary to protect people from exposure, such as barriers, notifications, application equipment, timing and many other factors, are specific to the application types and possibly locations. Pesticide labels will have precautionary statements and use directions to protect people from various routes of exposure, which may include inhalation and dermal exposure. It will be the state department's, state agency's, or public benefit corporation's responsibility to set conditions in which these label requirements are met, which may include such things as procedures to keep people out of treatment areas for a specified period of time if required by the label.

Comment 12: A commentor suggested that the use of glyphosate in accordance with the label directions developed and approved by the manufacturer, the United States Environmental Protection Agency, and DEC is the standard to reduce or eliminate actual or significant threat of direct human exposure. This commentor considers that through pesticide label development and approval process the pesticide label is sufficient to serve as the human exposure assessment in the regulation.

(Commentor 6)

Response to comment 12: DEC partially agrees with this comment since the pesticide registration is the mechanism to protect people from pesticide exposures. However, the parameters and circumstances of specific application types and possibly locations need to be considered for the human exposure assessment in the regulation. The statute and regulation reiterate the need for applicators to apply pesticides according to label directions, but it is also the state department's, state agency's, or public benefit corporation's responsibility to have a written human exposure assessment which must include conditions on how the label requirements will be met for the specific application type to protect people from exposure. A few possible examples of how this protection can be achieved have been placed in the regulation in clause 325.42(b)(2)(ii)(b), which may include the use of visual markers, barriers, or other means to prevent human exposure to glyphosate.

Comment 13: A comment was received about the need for each state department, state agency, or public benefit corporation to develop their own version of a human exposure assessment which could result in numerous versions of assessments with no regulatory standard to measure human exposure. This comment also mentioned that each state department, state agency, or public benefit corporation may not have the expertise and resources to create these assessments.

(Commentor 6)

Response to comment 13: DEC recognizes and expects that there would be multiple versions of the human exposure assessment since they will be specific to the state department, state agency, or public benefit corporation based upon application type and location. The regulatory standard for human exposure has been established through the pesticide label registration process; however, the responsibility of determining how the label requirements will be met will fall upon the state department, state agency, or public benefit corporation and must be documented in their written human exposure assessment. This assessment must include procedures on how the label requirements will be met for the specific application type to protect people from exposure. Examples of possible procedures on how the label requirements will be met have been placed in the regulation in clause 325.42(b)(2)(ii)(b). Furthermore, if a state department, state agency, or public benefit corporation does not have the expertise or resources to create this assessment as required by the regulation they should not apply glyphosate products on state property because they would not be able to comply with the statutory requirement in ECL Section 33-1301 of "direct application in circumstances when there is no actual or significant threat of direct human exposure".

Comment 14: A commentor suggested that the human exposure assessment could be provided on a system wide basis rather than an individual site-specific basis when the effects, setting, and pathways of exposure do not change.

(Commentor 7)

Response to comment 14: The human exposure assessment depends on the type of application that will occur. If the type of application remains the same and the human exposure assessment can be developed to consider the scenarios in which humans may be exposed to glyphosate on a system wide basis, that will be sufficient. However, if the parameters of site-specific application differ from the system wide assessment, then glyphosate cannot be applied until the human exposure assessment is updated to reflect the parameters of that application.

Comment 15: A commentor requested that DEC place a specific allowance in the regulation for gas and electric infrastructure vegetation management to ensure public safety into the regulation, similar to the allowance in subparagraph 325.42(b)(1)(ii) to maintain roadside vegetation to ensure public safety. The commentor considers gas and electric facilities to be critical infrastructure, yet they requested a specific allowance for this use in the regulation.

(Commentor 7)

Response to comment 15: The ability to use glyphosate on state property to maintain roadside vegetation to ensure public safety and to maintain critical infrastructure was written specifically into the statute. When the regulation was being drafted DEC believed that roadside vegetation was easy to identify and opted not to define this term. However, during the development of this regulation it was recognized that the categories of critical infrastructure were so widespread that identifying and listing each type of critical infrastructure was impractical. Therefore, DEC decided to define critical infrastructure broadly to allow for wide range coverage by this definition. DEC is choosing not to place a specific allowance for gas and electric infrastructure into the regulation since these facilities are already covered by the definition of critical infrastructure and the listing of specific examples of critical infrastructure in the regulation would likely create complications.

Comment 16: A commentor asked for clarification associated with 6 NYCRR 325.42(b)(4)(vi) which states *“an update to the glyphosate alternatives analysis, prior to the application of glyphosate, when any of the conditions of the glyphosate alternative assessment are modified.”*

The commentor feels that the wording of this item should be clarified to further define the intention of “any” conditions and “modified.” Furthermore, the commentor believes that the regulation in both paragraphs 325.42(b)(2) and 325.42(b)(4) do not mandate the development of conditions or define what a condition is in the human exposure assessment or the glyphosate alternative analysis. They were also concerned about how conditions would be enforced. The commentor recommended that an alternative word be substituted for “condition” so there is a connection to the modified circumstances in the assessment. As the costs and availability of the products, costs and availability of personnel and equipment resources are regularly changing, it

must be clear that changes to the formal assessment would be based on significant overall changes in the basis of the analysis.

The commentor recommends changing this paragraph to *“an update to the glyphosate alternatives analysis, prior to the application of glyphosate, when criteria used in the glyphosate alternative assessment are modified to an extent that may change the conclusion of the assessment.”*

(Commentor 6)

Response to comment 16: The term “condition” referred to in the regulation describes the items addressed in the human exposure assessment and glyphosate alternative analysis by the state department, state agency, or public benefit corporation that developed these documents. The term “condition” is synonymous with “specifications” or “requirements” and describes the information placed in the human exposure assessment and glyphosate alternative analysis that is used by the state department, state agency, or public benefit corporation to justify applying glyphosate according to the statute and regulation.

The human exposure assessment will describe the settings and pathways of exposure and place conditions in the document to prevent these exposures. For example, if the glyphosate pesticide label identifies a dermal exposure and requires applicators to keep people out of the treated area until the spray is dry, the state department, state agency, or public benefit corporation will need identify this exposure scenario and place conditions in their human exposure assessment describing the procedures to keep people out of the treated area for the specified time period. DEC considers the term “conditions” as appropriate for these procedures and it will remain in the regulations.

Likewise, the glyphosate alternative analysis will be developed by the state department, state agency, or public benefit corporation identifying the situations in which there may not be an effective and practicable alternative to glyphosate and will need to place conditions in the glyphosate alternative analysis describing when glyphosate may be used based upon costs, resources, or environmental concerns, etc. For example, if a state department, state agency, or public benefit corporation determines that glyphosate is the only effective pesticide to be used in a wetland based upon target pest, application site, and label requirements they must place conditions in the glyphosate alternative analysis describing how and when glyphosate is appropriate to use. These conditions may include that it may only be used for a specific target pest, in wetland application sites, and following all label requirements. If these conditions are not met, glyphosate will not be allowed for use. DEC considers the term “conditions” as appropriate for these requirements and it will remain in the regulations.

In addition, the commentor’s requested that DEC only require an update to the glyphosate alternative analysis when the criteria are modified to change the conclusions of the analysis. Any glyphosate applications that deviate from the conditions developed and documented by the state department, state agency, or public benefit corporation in their glyphosate alternative analysis must be documented in and supported by the analysis prior to glyphosate being applied. This portion of the regulation applies whenever there are deviations from the conditions in the

glyphosate alternative analysis and not only those that change the conclusion of the analysis. The glyphosate alternative analysis is a fundamental requirement in the regulation to meet the requirements of subdivision 12 to Section 33-1301 of the ECL. There may be many modifications to the glyphosate alternative analysis that may not change the conclusion of the analysis to use glyphosate, however, the new modifications justify the continued use of glyphosate and must be documented prior to the application. Therefore, DEC will not be amending this paragraph as requested by the commentor.

Comment 17: A commentor suggested that the glyphosate alternative analysis could be provided on a system wide basis rather than an individual site-specific basis when the proper product or combination of products determined for use do not change.

(Commentor 7)

Response to comment 17: The glyphosate alternative analysis depends on the type of application that will occur. If the type of application remains the same the glyphosate alternative analysis can be developed to consider system wide scenarios in which glyphosate is acceptable to be used. However, if the parameters of site-specific application differ from the system wide analysis, then glyphosate cannot be applied until the analysis is updated to reflect the parameters of that application.

Comments 6 NYCRR 325.42(c):

Comment 18: A comment was received concerning the ability to plan application dates prior to application as required by subparagraph 325.42(c)(1)(i) based upon weather and other factors.

(Commentor 6)

Response to Comment 18: Subparagraph 325.42(c)(1)(i) allows for individual date, dates, or a date range to be documented prior to application. The determination on how this requirement is met will be made by the state department, state agency, or public benefit corporation and may be very specific or may be broad and include a range of dates for the entire treatment season.

Commentor	Commentor Number
Sustainable Business Recruitment	1
Sarah Woodside Gallagher	2
Trix Niernberger	3
Yalda Moslehian	4
Adirondack Park Invasive Plant Program	5
NYS Department of Transportation	6
Environmental Energy Alliance of NY	7

Ulster County Agriculture & Farmland Protection Board	8
--	---

SUMMARY REGULATORY IMPACT STATEMENT

This proposed rulemaking is required by subdivision 12 of Section 33-1301 of the Environmental Conservation Law (ECL) and will revise 6 NYCRR Part 325 by adding Section 325.42 to address the prohibition and exemptions from prohibition of glyphosate use by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property.

1. LEGISLATIVE OBJECTIVES

The New York State Legislature developed this legislation to protect the health, safety, and wellbeing of the residents of the state from the potential impacts of the pesticide glyphosate, while permitting its application under certain defined circumstances for critical uses.

3. NEEDS AND BENEFITS

Glyphosate is a broad-spectrum herbicide active ingredient with approximately 200 products registered in New York State. Glyphosate is commonly used by state departments, state agencies, and public benefit corporations for various vegetation control projects.

There has been discussion and debate over the last several years regarding glyphosate being a possible human carcinogen and potentially contributing to Non-Hodgkin's Lymphoma or Chronic Lymphocytic Leukemia. The World Health Organization's International Agency for Research on Cancer described glyphosate as a probable human carcinogen. However, the United States Environmental Protection Agency (USEPA) released the

glyphosate interim decision affirming that glyphosate is unlikely to be a human carcinogen and did not identify risks or concerns to human health when glyphosate products are used according to the label directions.

To address the potential health impacts and the public perception associated with glyphosate use the New York State Legislature deemed it in the public interest to prohibit the use of glyphosate on state properties. To achieve this, they passed legislation in 2020 creating chapter 378 of the laws of 2020, which established a new subdivision 12 of Section 33-1301 of the ECL that completely prohibited the application of glyphosate by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. However, there was a recognition that there were uses of glyphosate that were necessary and through a 2021 chapter amendment, specifically chapter 19 of the laws of 2021, exemptions to this prohibition were added to subdivision 12. As required by the ECL the proposed addition of Section 325.42 to 6 NYCRR Part 325 will address the parameters in which glyphosate use on state property can be applied under subdivision 12 of Section 33-1301 of the ECL.

In addition to the requirements for the use of glyphosate on state properties the statute also requires the Department to post information on its website regarding glyphosate use on state properties, including amount and location, by April first of each year. To accomplish this objective state departments, state agencies, and public benefit corporations will be required to report their use of glyphosate.

4. COSTS

Costs to Industry:

This proposed rule is expected to have little cost impacts to industry since it only relates to state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. In the case of contractors or subcontractors working on state properties, it is likely that herbicide applications will be made with a glyphosate alternative or under an exemption to the glyphosate prohibition in the statute and regulations. Therefore, the impact on these contractors or subcontractors should be minimal.

Costs to Department and the State:

The Department is responsible for the implementation and administration of this proposed regulation. It is anticipated that the proposed regulation will increase costs through staff time associated with outreach, compliance, and reporting efforts, as well as the development of a new reporting and data management system. Furthermore, reporting, documentation, and research costs by state departments, state agencies, and public benefit corporations may also increase slightly if they choose to use glyphosate under an exemption.

State departments, state agencies, and public benefit corporations that are no longer permitted to apply glyphosate may experience added costs to achieve similar vegetation control. In some instances, programs at the Department have estimated that the use of alternative pesticides to glyphosate may be two to three-times the cost to achieve the same level of vegetation control and mechanical vegetation control has proven to be costly, time consuming, and may require specialized equipment.

Costs to Local Governments:

There are no anticipated costs to local governments.

5. LOCAL GOVERNMENT MANDATES

The proposed rulemaking does not directly mandate the expenditure of funds by local government agencies because it does not apply to local governments.

6. PAPERWORK

The proposed rulemaking will require additional paperwork for state departments, state agencies, and public benefit corporations that choose to apply glyphosate under an exemption. The additional paperwork required by this proposed regulation will be a written assessment to document the exemption to the prohibition of the use of glyphosate, a human exposure assessment, a glyphosate alternative analysis, and the reporting of glyphosate use.

7. DUPLICATION

The proposed regulation does not duplicate any federal or state regulations or statutes.

8. ALTERNATIVE APPROACHES

The no action alternative was not considered during the development of this proposed regulation given that the statute requires the Department to develop regulations regarding the use of glyphosate by state departments,

state agencies, and public benefit corporations. However, the Department did consider the alternative of not requiring a written assessment for glyphosate use under the exemptions for state departments, state agencies, and public benefit corporations. It was determined that this option would not provide an adequate level of oversight and information required to ensure that the Department meets its statutory responsibilities. Therefore, this alternative was rejected.

9. FEDERAL STANDARDS

Under the Federal Insecticide, Fungicide, and Rodenticide Act, (FIFRA), specifically 7 U.S.C. 136v, a State may regulate the sale or use of any federally registered pesticide in the State but only if, and to the extent that, the regulation does not permit any sale or use prohibited by FIFRA. Currently, glyphosate is registered with USEPA and it is allowed to be sold and used in New York State. This proposed rulemaking exceeds the federal minimum standards in that it limits the use of glyphosate by state departments, state agencies, and public benefit corporations, an action that is not prohibited by FIFRA.

10. COMPLIANCE SCHEDULE

Compliance with this proposed rulemaking will be required upon adoption of the final regulation.

11. INITIAL REVIEW OF RULE

DEC will conduct an initial review of the rule within three years as required by SAPA § 207.

REGULATORY IMPACT STATEMENT

INTRODUCTION

This proposed rulemaking is required by subdivision 12 of Section 33-1301 of the Environmental Conservation Law (ECL) and will revise 6 NYCRR Part 325 by adding Section 325.42 to address the prohibition and exemptions from prohibition of glyphosate use by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. This proposed regulation will also require state departments, state agencies, and public benefit corporations to report their glyphosate use on state properties to the New York State Department of Environmental Conservation (Department). In addition, the Department is required to post information on its website regarding glyphosate usage by state departments, state agencies, public benefit corporations, their contractors or subcontractors on state property by April first of each year.

The Department's statutory authority associated with the proposed regulations is outlined in Section 1 below. Section 2 summarizes relevant legislative objectives, and Section 3 discusses the needs and benefits of the proposed regulations. An assessment of the potential costs associated with the proposed regulations is found in Section 4. Mandates on local government are described in Section 5, while sections 6 through 8 address the paperwork requirements, whether the regulations duplicate other federal and state programs, and alternatives to the proposed rules. Sections 9 and 10 describe the applicability of any federal programs to the activities covered by the proposed regulations and the compliance schedule of the proposed rules for the regulated community. Section 11 describes the review of the rule.

1. STATUTORY AUTHORITY

The Department's statutory authority to promulgate regulations related to the sale, possession, and use of pesticides is found in:

- ECL Section 1-0101 declares a policy of the State to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution in order to enhance the health, safety and welfare of the people of the State and their overall economic and social wellbeing.
- ECL Section 3-0301 empowers the Commissioner to adopt rules and regulations as may be necessary to carry out the environmental policy of the State set forth in Section 1-0101.
- ECL Article 33, Pesticides.
 - Section 33-0301 declares it to be in the public interest of the State to regulate the registration, commercial use, purchase and custom application of pesticides to ensure the protection of public health, property and wildlife and require persons to register or obtain permits before engaging in activities involving pesticides.
 - Section 33-0303 authorizes the Commissioner to promulgate regulations to implement and give full force and effect of the provisions of Article 33.
 - Section 33-1301 authorizes the Department to promulgate regulations to carry out the prohibition and exemptions from prohibition of glyphosate use by state

departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property as set forth as follows in subdivision 12:

33-1301. Unlawful Acts

It shall be unlawful:

12. For any state department, agency, public benefit corporation or any pesticide applicator employed thereby as a contractor or subcontractor to apply glyphosate on state property, provided that the application of glyphosate on state property is permitted only for (a) direct application in circumstances when there is no actual or significant threat of direct human exposure and no effective and practicable alternative, and (b) for the following uses, pursuant to regulations promulgated by the department:

(i) to maintain critical infrastructure;

(ii) to manage roadside vegetation to ensure public safety;

(iii) habitat management for the control of invasive species identified pursuant to title seventeen of article nine of this chapter, pests of significant public health importance, noxious weeds designated by the department as injurious to ecosystem health, and the protection of critical native plant species; and

(iv) for research purposes to develop sustainable alternatives for agricultural and environmental usages, as well as research regarding the environmental motility of glyphosate.

The department shall post information on its website regarding glyphosate usage pursuant to this section, including amount and location, by April first of each year.

2. LEGISLATIVE OBJECTIVES

The New York State Legislature developed this legislation to protect the health, safety, and wellbeing of the residents of the state from the potential impacts of the pesticide glyphosate, while permitting its application under certain defined circumstances for critical uses.

3. NEEDS AND BENEFITS

Glyphosate is a broad-spectrum herbicide active ingredient with approximately 200 pesticide products registered in New York State. Glyphosate is commonly used by state departments, state agencies, and public benefit corporations for various vegetation control projects. These projects include the following: rights-of-way vegetation control for natural gas and power lines; the control of invasive and noxious plants; the control of vegetation at dams; wetland restoration; and general vegetation control for maintenance of parking lots, sidewalks, landscapes, and roadways for both safety and appearances.

Discussions over the last several years regarding glyphosate being a possible human carcinogen and potentially contributing to Non-Hodgkin's Lymphoma or Chronic Lymphocytic Leukemia has led to several lawsuits associated with this pesticide. These cases have been settled mostly in the favor of the plaintiffs and against the registrants, which has created a public perception that glyphosate may cause significant health impacts when used. The World Health Organization's International Agency for Research on Cancer (IARC) described glyphosate as a probable human carcinogen. Whereas, in January 2020, the United States Environmental Protection Agency (USEPA) released the glyphosate interim decision as part of their registration review process.

This interim decision affirmed that glyphosate is unlikely to be a human carcinogen and did not identify risks or concerns to human health when glyphosate products are used according to the label directions. This interim decision is consistent with the earlier decisions USEPA issued associated with glyphosate and was subject to public comment. The USEPA's website mentions that IARC's assessment was not as comprehensive as USEPA's assessment. Furthermore, USEPA mentioned on their website that they considered a more extensive and relevant dataset than IARC as part of their assessment and that they did not agree with IARC's conclusion.

Due to the concern and public perception associated with the potential health impact of glyphosate the New York State Legislature deemed it in the public interest to prohibit the use of glyphosate on state properties. To prohibit the use of glyphosate, the New York State Legislature passed legislation in 2020 creating chapter 378 of the laws of 2020, which established a new subdivision 12 of Section 33-1301 of the ECL that completely prohibited the application of glyphosate by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. However, there was a recognition that there were uses of glyphosate that were necessary for state departments, state agencies, and public benefit corporations to provide public safety and environmental protections and through a 2021 chapter amendment, specifically chapter 19 of the laws of 2021, exemptions to this prohibition were added to subdivision 12. These exemptions allowed for the application of glyphosate on state properties to maintain critical infrastructure, manage roadside vegetation, manage invasive species, control pests of significant public health importance, control noxious weeds, protect critical native plant species, and conduct research to develop sustainable alternatives to the use of glyphosate or study the motility of glyphosate. These uses are only permitted if there are no effective and practicable alternatives to glyphosate and there is no actual or significant threat of direct human exposure.

The Legislature agreed that the need to maintain critical infrastructure such as utility rights of way, dams, structures, and environmental resources is essential to New York State. The use of glyphosate can provide an economical and effective option for state departments, state agencies, and public benefit corporations to maintain this critical infrastructure to assure uninterrupted power distribution, to keep dams and other structures free of vegetation which could compromise their integrity, and to protect critical environmental resources. They also agreed that the control of roadside vegetation around signs, guiderails, shoulders, traffic signals, and intersections provides a visual margin of safety for motorists, commercial drivers, bicyclists, and pedestrians, which is essential for public safety. The use of glyphosate under the appropriate circumstances and conditions can be highly effective in meeting these control needs.

In addition, the Legislature agreed with the need to control invasive species and noxious weeds to protect native plants and ecosystem health, which is a mission of several state agencies and state departments. Glyphosate in many cases may be the only pesticide labeled for invasive species control needed for habitat management. Completely prohibiting its use would leave few, if any, options for such control efforts. Lastly, the Legislature agreed that there may be a need for state departments, state agencies, and public benefit corporations to conduct research on state properties to study the alternatives and the environmental motility of glyphosate.

Furthermore, the Legislature required the Department to post information on its website regarding glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property, including amount and location, by April first of each year.

The proposed addition of Section 325.42 to 6 NYCRR Part 325 will address the parameters in which state departments, state agencies, public benefit corporations, their contractors or their subcontractors can apply glyphosate on state property as permitted under subdivision 12 of Section 33-1301 of the ECL. Whereas the Legislature already outlined the circumstances in which glyphosate is permitted for use on state properties, the Legislature required the Department to

develop regulations to clarify the glyphosate use requirements for state departments, state agencies, public benefit corporations, their contractors, or their subcontractors while still ensuring the statutory intent of protecting the public and the environment. This proposed rulemaking will establish regulations for the use of glyphosate on state properties and the collection of glyphosate application information from state departments, state agencies, and public benefit corporations for applications on state property.

The statutory subdivision requires the Department to specify when it will be appropriate for state departments, state agencies, and public benefit corporations to apply glyphosate, but the limits set by the statutory subdivision to allow glyphosate use are broad. In order to further delineate the statutory parameters, the proposed regulation defines several terms. Among the terms defined are “critical infrastructure” and “state property”. The “critical infrastructure” definition was derived from the definition used in the Public Officers Law. However, the Public Officers Law definition was amended to reflect the Department’s mission to protect environmental resources; therefore, “environmental resources” were added to the list of terms describing critical infrastructure. The definition of “state property” reflects New York State owned-in-fee real property that is operated by a state department, state agency, or a public benefit corporation. The Department considers state owned in fee rights-of-way and easements to be state property under this definition. In addition, the proposed regulations will require state departments, state agencies, and public benefit corporations to develop written assessments documenting their need to use glyphosate and how they meet the exemption from prohibition for use of glyphosate on critical infrastructure, roadways, for invasive species and noxious plant control, or for research into glyphosate alternatives. This assessment must also include a discussion regarding alternatives to the use of glyphosate and why the alternatives are not effective and practicable.

In addition, the statutory subdivision and the proposed regulation require glyphosate to be used only when there is no actual or significant threat of direct human exposure. The pesticide label approved by the USEPA and the Department is designed to protect individuals and environmental resources from exposure to the pesticide. Following label directions will alleviate direct human exposure. Although ECL Section 33-0725 and Section 325.2 of 6 NYCRR Part 325 already require pesticides to be used according to their label directions, this proposed regulation will supplement these protections by requiring that the written assessment describe how human exposure will be prevented, which may include additional precautions beyond label directions. The proposed regulation also requires the written assessments to be made available to the Department for inspection.

The proposed regulation contains enforcement provisions to require the state department, state agency, public benefit corporation, their contractors or their subcontractors to adhere to the exemption criteria, the parameters of the human exposure assessment, and the glyphosate alternatives analysis.

In addition to the requirements for the use of glyphosate on state properties, the statutory subdivision also requires the Department to post information on its website regarding glyphosate use on state properties. The required use information, including amount and location, is required to be posted on the Department’s website by April first of each year. The only way to accomplish this goal will be to require reporting to the Department of glyphosate use by state departments, state agencies, and public benefit corporations. The proposed regulations will define the reporting requirements specifically for these glyphosate uses that will be separate and distinct from other pesticide use reporting requirements.

4. COSTS

Costs to Industry:

This proposed rulemaking prohibits the application of glyphosate by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. This proposed rule is expected to have little cost impacts to industry, since it only relates to state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. In the case of contractors or subcontractors working on state properties, it is likely that herbicide applications will be made with a glyphosate alternative or under an exemption to the glyphosate prohibition in the statute and regulations. Therefore, the impact on these contractors or subcontractors should be minimal.

Costs to the Department and the State:

The Department is responsible for the implementation and administration of this proposed regulation. It is anticipated that the proposed regulation will increase costs through staff time associated with outreach, compliance, and reporting efforts, as well as the development of a new reporting and data management system. This data management system may become a component of Department's existing New York State Pesticide Administration Database (NYSPAD). NYSPAD has been utilized for several years associated with pesticide product registration, pesticide applicator certification, business registration, and pesticide courses. It is anticipated that the next stage of NYSPAD development will capture and store information associated with the pesticide reporting law. The reporting of glyphosate use by state departments, state agencies, and public benefit corporations is not a component of the pesticide reporting law. It is likely that these new reporting requirements will be incorporated into NYSPAD as a separate reporting component. The total cost for the development of the NYSPAD system is estimated to be about three million dollars; however, the reporting component of this regulation is expected to be a small percentage of this total.

Reporting costs by state departments, state agencies, and public benefit corporations may also increase slightly. Although the current statutorily required pesticide records can be utilized for reporting glyphosate use to the Department, the required reports under this proposed rulemaking will differ in format and timeframe. Each individual state department, state agency, or public benefit corporation will have different costs based upon the amount of glyphosate used and the complexity of their reporting system.

State departments, state agencies, and public benefit corporations that are no longer permitted to apply glyphosate may experience added costs to achieve similar vegetation control. In some instances, programs at the Department have estimated that the use of alternative pesticides to glyphosate may be two to three-times the cost to achieve the same level of vegetation control.

The use of mechanical vegetation control as an alternative to glyphosate has proven to be time consuming and may require specialized equipment. The costs associated with mechanical control for state departments, state agencies, and public benefit corporations will be in staff costs, contractor costs, and possibly the purchase and upkeep of equipment. These costs are expected to be significantly higher than the use of glyphosate to control a similar area of vegetation.

In situations where it is permissible for state departments, state agencies, and public benefit corporations to apply glyphosate on state properties, as allowed by the statutory exemptions, there still may be increased costs as well. These costs will be associated with the additional documentation, research, and reporting required for those state departments, state agencies, and public benefit corporations that choose to pursue the use of glyphosate.

Costs to Local Governments:

The proposed rulemaking does not apply to local governments; therefore, there are no anticipated costs to local governments.

5. LOCAL GOVERNMENT MANDATES

The proposed rulemaking does not directly mandate the expenditure of funds by local government agencies because it does not apply to local governments.

6. PAPERWORK

The proposed rulemaking will require additional paperwork for state departments, state agencies, and public benefit corporations that choose to apply glyphosate under an exemption to maintain critical infrastructure, manage roadside vegetation, manage invasive species, control pests of significant public health importance, control noxious weeds, protect critical native plant species, or conduct research to develop sustainable alternatives to the use of glyphosate or study the motility of glyphosate. The additional paperwork required by this proposed regulation will be a written assessment to document the exemption to the prohibition of the use of glyphosate, a human exposure assessment, a glyphosate alternative analysis, and the reporting of glyphosate use.

7. DUPLICATION

The proposed regulation does not duplicate any federal or state regulations or statutes.

8. ALTERNATIVE APPROACHES

The no action alternative was not considered during the development of this proposed regulation given that the statute requires the Department to develop regulations regarding the use of glyphosate by state departments, state agencies, and public benefit corporations. However, the Department did consider the alternative of not requiring a written assessment for glyphosate use under the exemptions for state departments, state agencies, and public benefit corporations. It was determined that this option would not provide the level of oversight and information required to ensure that the Department meets its statutory responsibilities. Therefore, this alternative was rejected.

9. FEDERAL STANDARDS

Under the Federal Insecticide, Fungicide, and Rodenticide Act, (FIFRA), specifically 7 U.S.C. 136v, a State may regulate the sale or use of any federally registered pesticide in the State but only if, and to the extent that, the regulation does not permit any sale or use prohibited by FIFRA. Currently, glyphosate is registered with USEPA and it is allowed to be sold and used in New York. This proposed rulemaking exceeds the federal minimum standards in that it limits the use of glyphosate by state departments, state agencies, and public benefit corporations, an action that is not prohibited by FIFRA.

10. COMPLIANCE SCHEDULE

Compliance with this proposed rulemaking will be required upon adoption of the final regulation.

11. INITIAL REVIEW OF RULE

DEC will conduct an initial review of the rule within three years as required by SAPA § 207.

RURAL AREA FLEXIBILITY ANALYSIS

The New York State Environmental Conservation Law (ECL) was amended to add subdivision 12 to Section 33-1301 to prohibit the use of glyphosate by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. Even though this subdivision prohibits the use of glyphosate the Legislature provided exemptions to this prohibition for critical uses of this pesticide. The Legislature also required the New York State Department of Environmental Conservation (Department) to promulgate regulations describing the circumstances and conditions in which these critical uses are permitted and to post information on its website regarding glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. To achieve this statutory directive the Department's proposed rulemaking will revise 6 NYCRR Part 325 by adding section 325.42 to describe the parameters for glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. This proposed rulemaking will also require state departments, state agencies, and public benefit corporations to report their glyphosate use on state properties to the Department.

The Department does not expect the proposed rulemaking to have a significant negative impact on rural areas.

1. TYPES AND NUMBERS OF RURAL AREAS AFFECTED

The proposed rulemaking applies statewide to all state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. As the proposed rulemaking only applies to state departments, state agencies, public benefit corporations, their contractors, or their

subcontractors on state property the Department does not anticipate rural areas being significantly affected, either directly or indirectly, by this proposed rulemaking.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

The proposed rulemaking is intended to prohibit the use of glyphosate by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. There are exemptions to this prohibition that allow critical uses of glyphosate under certain circumstances. For state departments, state agencies, or public benefit corporations to take advantage of these exemptions they must prepare a written assessment of how they meet the exemption, how it has been determined that there is no direct human exposure, and how they have determined that there are no effective and practicable glyphosate alternatives. In addition, state departments, state agencies, and public benefit corporations must also annually report the use of glyphosate to the Department.

3. COSTS

All costs associated with this proposed regulation will be on state departments, state agencies, and public benefit corporations. This proposed rulemaking does not directly mandate the expenditure of funds by any sector of local government and will not directly impose any significant service, duty or responsibility upon any county, city, town, village, school district, or fire district in a rural area.

4. MINIMIZING ADVERSE IMPACTS

The proposed regulation is not expected to have significant rural area adverse impacts in New York State since it only applies to glyphosate applications on state property by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor. In addition, there are several alternatives to glyphosate available for use by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor. Furthermore, the proposed regulation provides exemptions for critical uses as well. Therefore, adverse impacts to rural areas have been minimized through the proposed rulemaking and statutory requirements.

5. RURAL AREA PARTICIPATION

The Department conducted a stakeholder meeting, informal meetings, and calls with state departments, state agencies, public benefit corporations, and interested parties associated with this proposed rulemaking, including those located in rural areas.

6. INITIAL REVIEW OF RULE

DEC will conduct an initial review of the rule within three years as required by SAPA § 207.

REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES
AND LOCAL GOVERNMENTS

The New York State Environmental Conservation Law (ECL) was amended to add subdivision 12 to Section 33-1301 to prohibit the use of glyphosate by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. Even though this subdivision prohibits the use of glyphosate the Legislature provided exemptions to this prohibition for critical uses of this pesticide. In this amendment the Legislature also required the New York State Department of Environmental Conservation (Department) to promulgate regulations describing the circumstances and conditions in which these critical uses are permitted and to post information on its website regarding glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. To achieve this statutory directive the Department's proposed rulemaking will revise 6 NYCRR Part 325 by adding section 325.42 to describe the parameters for glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. This proposed rulemaking will also require state departments, state agencies, and public benefit corporations to report their glyphosate use on state properties to the Department.

1. EFFECT OF RULE

Subdivision 12 of ECL Section 33-1301 prohibits the use of glyphosate by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property to provide public safety and environment protections. This subdivision also provides exemptions to the prohibition for critical uses of glyphosate. Moreover, this subdivision requires the Department to promulgate

regulations describing the circumstances and conditions in which these critical uses are permitted and to post information on its website regarding glyphosate use by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property.

The critical uses identified by the Legislature were to maintain critical infrastructure, control roadside vegetation to ensure public safety, control invasive species, control noxious weeds injurious to ecosystem health, protect native plants, and conduct research on state properties to study the alternatives and the environmental motility of glyphosate. The option to use glyphosate under an exemption in the statute only applies if there is no actual or significant threat of direct human exposure and there are no effective and practicable alternatives to glyphosate use.

The proposed rulemaking is not expected to have an impact on local governments or small businesses as it only applies to state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. The limited scope of this proposed rulemaking will allow small businesses that may contract or subcontract with state departments, state agencies, or public benefit corporations to use alternative pesticides or practices instead of glyphosate to control vegetation. Furthermore, the exemption for critical uses in the proposed rulemaking will allow them to use glyphosate when it is appropriate. Based upon these alternatives and exemptions it is expected that small businesses, employing certified pesticide applicators, will be able to continue to contract with state departments, state agencies, or public benefit corporations. Therefore, there should be no impacts to small businesses. Likewise, this proposed rulemaking should not result in impacts to local governments since it does not apply to them.

2. COMPLIANCE REQUIREMENTS

Small businesses will be required to adhere to the contracting requirements with state departments, state agencies, or public benefit corporations associated with the use of glyphosate or glyphosate alternatives on state properties. In addition, they may only apply glyphosate on state property when permitted by an exemption identified in the statute and proposed rulemaking. The additional paperwork required by this proposed regulation does not apply to small businesses but instead applies to the state departments, state agencies, and public benefit corporations that choose to apply glyphosate under an exemption and either apply themselves or hire a contractor or subcontractor. Local governments do not have any compliance requirements since this proposed rulemaking does not apply to them.

3. PROFESSIONAL SERVICES

There is no anticipated need for additional professional services for local governments or small businesses associated with this proposed rulemaking.

4. COMPLIANCE COSTS

It is anticipated that there should not be compliance costs for local governments since they do not have any compliance requirements associated with this proposed rulemaking. The compliance costs to small businesses should be minimal since the proposed rulemaking focuses on state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. Although small businesses will be required to adhere to their contracting requirements with state departments, state agencies, or public benefit corporations associated with the use of glyphosate and glyphosate alternatives on

state properties it is not anticipated that this will increase costs for these small businesses. Small businesses that do not contract with state departments, state agencies, or public benefit corporations will not be impacted by this rulemaking.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The Department has focused on proposing this rulemaking in a manner that is technically sound and economical. To minimize the technological and economic impacts associated with this proposed rulemaking research was conducted into the availability of glyphosate alternatives to allow state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property to continue their operations without interruption. There are several alternative pesticide products, similar to glyphosate, that can be used when this regulation goes into effect allowing for a smooth transition period.

6. MINIMIZING ADVERSE IMPACTS

The proposed regulation is not expected to have an adverse impact on jobs and employment opportunities. The Department already regulates pesticide use and there are several alternatives to glyphosate available. The proposed regulation provides exemptions for essential uses as well. Therefore, the statute and this proposed rulemaking have minimized adverse impacts.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

In addition to comprehensive internal review, the Department has conducted a stakeholder meeting, informal meetings, and calls with interested parties associated with this proposed rulemaking.

8. CURE PERIOD OR OTHER OPPORTUNITY FOR AMELIORATIVE ACTION

Compliance with this proposed rulemaking will be required upon the effective date of the final rule.

9. INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within three years as required by SAPA § 207.

JOB IMPACT STATEMENT

The New York State Environmental Conservation Law (ECL) was amended to add subdivision 12 to Section 33-1301 to prohibit the use of glyphosate by state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property. Even though this subdivision prohibits the use of glyphosate the Legislature provided exemptions to this prohibition for critical uses of this pesticide. The Legislature also required the New York State Department of Environmental Conservation (Department) to promulgate regulations describing the circumstances and conditions in which these critical uses are permitted and to post information on its website regarding glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. To achieve this statutory directive the Department's proposed rulemaking will revise 6 NYCRR Part 325 by adding section 325.42 to describe the parameters for glyphosate use by state departments, state agencies, public benefit corporations, their contractors, or their subcontractors on state property. This proposed rulemaking will also require state departments, state agencies, and public benefit corporations to report their glyphosate use on state properties to the Department.

This proposed rulemaking should not impact jobs within the regulated sectors and the Department does not expect the proposed regulations to have a negative impact on jobs and employment opportunities in the State.

1. NATURE OF IMPACT

The proposed rulemaking only applies to state departments, state agencies, public benefit corporations, their contractors or subcontractors applying glyphosate on state properties; therefore, the limited scope of this

proposed rulemaking will limit impacts to jobs and employment opportunities across the State. In many cases there are alternative pesticides or practices to the use of glyphosate to control vegetation. Furthermore, the exemption for critical uses in the proposed rulemaking will permit glyphosate use. With these alternatives and exemptions, certified pesticide applicators and those working under their supervision employed by state departments, state agencies, public benefit corporations, their contractors or subcontractors will be able to maintain their employment status. In addition, this proposed rulemaking should not inhibit the growth of or employment in any of the other sectors of the pesticide application industry.

2. CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The implementation of the proposed rulemaking is not expected to have an adverse impact on jobs or employment opportunities. The proposed rulemaking only applies to state departments, state agencies, public benefit corporations, their contractors or subcontractors applying glyphosate on state properties. The limited scope of this proposed rulemaking will limit impacts to jobs and employment opportunities across the State. In many cases there are alternative pesticides or practices to the use of glyphosate to control vegetation and exemptions in the statute and proposed rulemaking will continue to allow the use of glyphosate for critical uses. Nothing being proposed is expected to result in diminished economic activity and accordingly should not cause adverse impacts on employment opportunities or jobs.

3. REGIONS OF ADVERSE IMPACT

There is no region of the State expected to be adversely impacted from this proposed rulemaking. All state departments, state agencies, public benefit corporations, or any pesticide applicator hired as a contractor or subcontractor on state property must adhere to the same requirements regardless of where they are located.

4. MINIMIZING ADVERSE IMPACT

The proposed regulations are not expected to have an adverse impact on jobs and employment opportunities. The Department already regulates pesticide use and there are several alternatives to glyphosate available. The proposed regulation provides exemptions for critical uses as well. Therefore, the statute and this proposed rulemaking have already minimized adverse impacts.

5. SELF-EMPLOYMENT OPPORTUNITIES

The proposed regulations are not expected to negatively impact self-employment opportunities.

6. INITIAL REVIEW OF RULE

The Department will conduct an initial review of the rule within three years as required by SAPA § 207.