

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of :
 : DECLARATORY
 RAY T. CHESBRO : RULING
 Assemblyman 117th District :
 : DEC 19-04
 for a Declaratory Ruling :
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New York State Assemblyman Ray T. Chesbro seeks a Declaratory Ruling, pursuant to Section 204 of the State Administrative Procedure Act and 6 NYCRR Part 619, to determine whether farmers in the Town of Volney, Oswego County, may burn trees and brush in the course of clearing land for agricultural purposes without first obtaining a Department ("DEC") permit regulating such burning. While the request for a Declaratory Ruling inquires specifically as to the application of 6 NYCRR Part 215, entitled "Open Fires", Title 11 of Article 9 of the Environmental Conservation Law ("ECL") and 6 NYCRR Part 191 also regulate open burning. There have been neither court decisions nor Declaratory Rulings on the applicability of any of these provisions to the practice of open burning of debris generated by land clearing for agricultural use. Therefore, it is in the public interest to clarify this issue.

The Part 215 "Open Fires" regulation was promulgated as part of the air pollution control program established pursuant to ECL §19-0301. Part 215 prohibits specified types of open burning and allows certain types of "restricted burning" to be done under a DEC permit. Open burning which is not specifically prohibited

or restricted may be conducted without a Part 215 permit, except during an air pollution episode. 6 NYCRR 215.2(g).

The open burning prohibitions in §215.2 prohibit any person from burning out of doors enumerated categories of "rubbish" and other refuse, except as permitted by §215.3. "Rubbish" is defined in §215.1(e) to include "trees or leaves, needles, and branches therefrom." Subdivision (e) of §215.2 contains a prohibition against open burning "for on-site disposal of rubbish generated by industrial or commercial activities other than agricultural" (emphasis added). Thus, rubbish generated by agricultural activities is explicitly excluded from the §215.2 prohibitions. In addition, the open burning of such rubbish is not listed as a restricted activity for which a permit is required under 6 NYCRR §215.3.

The petition raises the issue whether the rubbish generated by a farmer's initial clearing of land (rather than annual crop wastes) constitutes rubbish generated by an agricultural activity, thus exempting this activity from the prohibitions of §215.2(e). "Agricultural rubbish" is not defined in either the air pollution control statute or regulations or in any other State law.

A review of the historical materials relating to the open burning regulation reveals an explicit recognition on the part of the Department that the type of activity described in the petition was intended to be exempted from the permit requirements of Part 215 under the agricultural exemption. In 1975, the Department proposed amendments to Part 215 which were designed, inter alia, to eliminate the regulatory exemption for agricultural

activities. The amendments would have required a permit for "burning vegetation to provide a range for wildlife, game or livestock or for the initial establishment of an agricultural practice on previously uncultivated land."¹ In response to opposition by the agricultural community, including State and local agricultural agencies, to the elimination of the exemption, the proposed amendments were withdrawn in 1977.

As recognized in the petition, even where an activity is exempt from the permit requirements of Part 215, open burning remains subject to other statutory and regulatory requirements. ECL Article 9, Title 11, entitled "Forest Fire Control", and 6 NYCRR Part 191 regulate open burning for the purposes of forest fire prevention and control. ECL 9-1105(1), as recently amended by Chapter 298 of the Laws of 1986, prohibits the "setting of fires on or near forest land and leaving such fires unattended and unquenched" as well as the "setting of forest land on fire". "Forest land" under ECL §9-0101(5) "includes not only lands which may be covered with tree growth but also lands which are best adapted to forests."

ECL §9-1105(5) further prohibits the open burning of "logs, leaves, sawdust, slabs, brush, stumps, dry grass or other debris", in any fire town, without a permit. 6 NYCRR 191, entitled "Forest Fire Prevention", requires a permit for open fires in counties and towns listed therein, excepting "small fires for cooking, warmth

¹ Memorandum from Mr. Rihm to Dr. Hullar (July 11, 1975) (discussing proposed revision of 6 NYCRR 215).

or smudge, and open fires for the purpose of on site disposal of rubbish or other debris generated by residential activities." 6 NYCRR §191.1. Also excepted from the permit requirement of 6 NYCRR §191.1 are open fires "within the corporation tax limits of any city or village; or in any town with a total town population, including incorporated or unincorporated areas, of greater than 10,000 people." All of the areas in which permits are required under 6 NYCRR Part 191 are either fire towns as defined in ECL §9-1107, or are wholly or partially within forest fire districts, as defined in 6 NYCRR §191.2 pursuant to authority of ECL §9-1109(2). Since the Town of Volney, Oswego County, is neither a fire town nor is it located within a forest fire district, the requirements of ECL §9-1105(5) and 6 NYCRR 191.1 do not apply.

In sum, farmers may burn trees and brush generated by land clearing in order to use such land for agricultural purposes without obtaining a permit pursuant to 6 NYCRR Part 215, and, because the Town of Volney is neither a fire town nor within a fire district, such burning may be undertaken without obtaining a permit pursuant to 6 NYCRR Part 191. However, such open burning remains subject to all other applicable State statutory and regulatory requirements. In addition, compliance with local ordinances must occur. See 1953 Op. Atty. Gen. 152.

DATED: Albany, New York
October 21, 1986



Janice K. Corr
Deputy Commissioner and
General Counsel