Regulatory Impact Statement

1. Statutory authority:

The Commissioner of the Department of Environmental Conservation (Department), pursuant to Environmental Conservation Law (ECL) section 3-0301, has authority to protect the wildlife resources of New York State. Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to: ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. ECL section 11-0325 provides the authority to take action necessary to protect fish and wildlife from dangerous diseases. ECL 11-0505(8) prohibits the placement of any substance to attract or entice deer to feed within 300 feet of a public highway.

2. Legislative objectives:

The legislative objective of ECL section 3-0301 is to grant the Commissioner the powers necessary for the Department to protect New York's natural resources, including wildlife, in accordance with the environmental policy of the State. ECL 11-0303 mandates the adoption of sound management practices for the State's wildlife resources. ECL 11-0325 enables rapid response to wildlife diseases to ensure that wildlife populations are protected. ECL 11-0505(8) attempts to prevent deer impacts on public safety that could occur as a result of deer feeding activities. The proposed regulation achieves these objectives by restricting unauthorized intentional feeding of wild deer and moose that can lead to environmental harm, public hazard, and increased

wildlife disease risks. By permitting under specified conditions the use of automated feeding devices, in conjunction with use of 4-Poster™ Tickicide, the regulation allows the public to address local tick densities while mitigating potential deer-related problems.

3. Needs and benefits:

This rule making addresses three issues. First, existing regulations (6 NYCRR Part 189) meant to prevent the introduction or spread of chronic wasting disease (CWD) do not adequately address the need for general prohibitions on the feeding of wild white-tailed deer and moose. The existing regulations were originally promulgated in 2002 in response to the threat of CWD being introduced into New York. However, the justifications for prohibiting the feeding of deer and moose extend well beyond risks associated with CWD. Intentionally feeding deer and moose can artificially increase populations and cause behavioral changes, leading to harmful effects on wildlife, habitats and people. Second, a Sullivan County court ruled that portions of the Department's existing regulations related to feeding wild deer were not lawful, rendering enforcement of the regulations in Sullivan County and perhaps other counties problematic. The proposed regulations clarify and cure the deficits identified by the court. Third, 4-Poster™ Tickicide is registered by the Department to kill ticks on deer, in accordance with EPA Special Local Need Registration SLN NY-120001. Because the automated feeding devices used to administer 4-Poster™ Tickicide on deer rely on attracting deer with food such as corn, a clear regulatory regime is needed to govern the use of these devices and limit the associated negative impacts.

This rule making proposes to strengthen and clarify the existing prohibition on intentionally feeding of wild deer and moose and require that products packaged to be sold as a food or attractant for deer or moose carry a clear label stating that such use is illegal in New York. The rule will continue to provide appropriate exceptions for wildlife plantings, agricultural practices, livestock husbandry, and research and nuisance abatement actions permitted by the Department. It also clarifies that incidental feeding such as the attraction of deer or moose to a birdfeeder would only be considered a violation if the Department had previously issued a written warning to the person responsible for the incidental feeding. This will allow the Department to respond to specific nuisance situations without limiting bird feeding in general. Additionally, this rule making proposes to define the application procedures and conditions for issuance of a permit for the use of a 4-Poster™ Tickicide, including the requirement that automated feeding devices used with 4-Poster™ be used only in the context of a comprehensive management approach that also addresses local deer abundance.

A general prohibition on feeding wild deer and moose is a best management approach to reduce risks associated with communicable wildlife diseases, including CWD. Additionally, supplemental feeding can negatively affect deer behavior, leading to increased social conflict among deer, habituation of deer to humans, and alteration of migratory movements. Supplemental feeding can increase deer populations above ecologically sustainable levels, resulting in significant harm to local biodiversity and forest health.

The Department amended regulations in 2005 to prohibit the sale of “feed or equipment which is specifically labeled or packaged as a product to be used for feeding

or attracting wild white-tailed deer," and to require that signs notifying customers of the deer feeding prohibition be posted wherever feed for domestic livestock or wildlife was sold. Because the provision applied to all retailers offering feed for domestic livestock, including stores that sold small quantities of bird seed or suet, enforcement was difficult and the provisions were rescinded in 2010. Subsequently, though intentionally feeding wild deer and moose remained unlawful, the quantity of products labeled or packaged for feeding wild deer has increased dramatically in New York stores. The presence of products available for purchase but illegal for use sends a mixed message to consumers that likely contributes substantially to illegal feeding of deer. The proposed amendments require that products packaged to be sold as a food or attractant for deer or moose carry a clear label stating that such intentional use is illegal in New York. This should discourage the sale and illegal use of such products without affecting sale of products used to feed domestic livestock or other wildlife such as birds.

The 4-Poster™ deer treatment automated feeding device is a pesticide delivery system, designed to apply a dose of the synthetic pyrethroid permethrin to the neck and shoulder area of deer to kill ticks that have the potential to transmit disease to humans and domestic animals. The device presents corn as a bait through a small opening. When deer feed from the small opening, their necks contact rollers that are impregnated with permethrin, coating their hair with the pesticide.

Though 4-Poster™ Tickicide is a registered pesticide in New York, the Department has concerns with the unregulated use of feed to attract deer to the devices. Some have argued that the potential reduction of tick numbers in the environment near automated feeding devices with 4-Poster™ Tickicide and a possible reduction in human health

risks outweigh all other considerations, and that the Department should allow the use of these devices without any restrictions. However, the potential widespread use of automated feeding devices could have broad-ranging ecological impacts. To ensure that deployment of automated feeding devices does not worsen impacts associated with high deer populations, the proposed regulation clearly defines and limits the conditions under which the device may be allowed. Specifically:

- 4-Poster™ Tickicide may only be used by a municipality, landowner association, or private individual/corporation that has control over or ownership of at least 40 acres of deer habitat. This is necessary to comply with the product label, which states that automated feeding devices with 4-Poster™ Tickicide should be deployed at a rate of one device per 40 acres of treatment area.
- The user of an automated feeding device with 4-Poster™ Tickicide will need to provide location information on its placement. This will enable the Department to track their use, and to evaluate potential impacts on deer-car collisions, habitat damage and hunter participation and behavior, as well as reports of increased populations of deer or other species that cause conflicts with people (e.g., raccoons, Canada geese).
- 4-Poster™ Tickicide may only be used as one component of a comprehensive deer management plan (provided by the applicant) that includes measures to ensure that deer impacts will not increase as a result of deploying the 4-Poster™ devices. Specifically, applicants will be required to identify deer management actions they will take to ensure that deer density will not increase as a result of the enhanced food supply for deer within the area where automated feeding

devices with 4-Poster™ Tickicide would be deployed. Such actions may include, but are not limited to, recreational hunting, culling deer, and surgical sterilization.

- The user of an automated feeding device with 4-Poster™ Tickicide, as well as municipalities approving the use of such devices on land within their jurisdiction, must take steps to inform the public, including landowners, hunters, and local law enforcement agencies, of the presence and locations of automated feeding devices with 4-Poster™ Tickicide deer treatment in their area.
- Attraction of bears to the automated feeding devices could create a serious public safety hazard. In areas where bears may be present, the Department may require any user of an automated feeding device with 4-Poster™ Tickicide to install and maintain an appropriately designed fence to ensure that bears will not be able to gain access to the device. The Department may also require fencing if it determines that attraction of other non-target species (e.g. raccoons) poses an ecological or public safety risk. The Department will provide advice on fence design.

4. Costs:

The costs associated with adopting the proposed regulation relate to the outreach needed to the regulated community of these changes. These costs are minimal and entail production of press releases, bulletins for hand-out, and updates to the Department's website. This rulemaking should reduce costs associated with Department staff time reviewing permit applications for use of 4-Poster™ Tickicide, as terms and conditions will be codified in regulation rather than being addressed on a case-by-case basis.

5. Local government mandates:

The proposed rule does not impose any mandates on local governments. Municipalities that desire a permit to deploy automated feeding devices with 4-Poster™ Tickicide for deer treatment on lands that they own or oversee will need to prepare a deer management plan, submit annual reports to the Department, and conduct outreach to inform community members of the presence and locations of automated feeding devices.

6. Paperwork:

Under the proposed rule, municipalities, landowners, or associations of landowners desiring to deploy automated feeding devices with 4-Poster™ Tickicide for deer treatment must prepare an application with supporting documents, and if approved submit annual reports to the Department.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

The Department could attempt to enforce the existing deer feeding prohibition, but the legal precedent set by the Sullivan County case jeopardizes enforcement of the existing regulation throughout the State. For example, law enforcement personnel could be confronted with local justices who refuse to consider a specific case because of the prior Sullivan County decision. This would result in inefficient use of resources and potentially unequal application and enforcement throughout the State.

The Department could modify the deer feeding regulation to address the Sullivan County court decision but not address the sale of feed or attractants for wild deer and

moose. However, the Department does not believe this is a good option because the continued sale of feed and attractants for wild deer, despite their being illegal for use in New York, would perpetuate confusion among consumers and reduce the effectiveness of the feeding prohibition.

The Department could prohibit the use of automated feeding devices with 4-Poster™ Tickicide in the State, but that would be contrary to the Department's 2012 decision to approve registration of the automated feeding device with 4-Poster™ Tickicide as a legal method for dispensing permethrin into the environment in Nassau and Suffolk counties and the 2017 expansion of that registration to the entire State. Those approvals were granted despite concerns related to the supplemental feeding of deer that occurs when automated feeding devices with 4-Poster™ Tickicide are deployed.

The Department could allow any person to use automated feeding devices with 4-Poster™ Tickicide in any location in New York, subject to the limitations of 4-Poster™ Tickicide registration. However, the Department strongly contends that excessive use of automated feeding devices with 4-Poster™ Tickicide would concentrate deer, alter their behavior, and potentially increase local deer populations, which would exacerbate negative deer impacts on habitats and the public. Indiscriminate placement of automated feeding devices with 4-Poster™ Tickicide throughout New York would also expand and intensify risks associated with non-target wildlife feeding. Notably, automated feeding devices could promoted human-bear conflicts, and the supplemental feeding of raccoons would increase human health concerns associated with raccoon rabies. Some level of reasonable regulation, as proposed here, is needed.

9. Federal standards:

None.

10. Compliance schedule:

The regulated community will be required to comply with these regulations upon their adoption.