

ENVIRONMENTAL LAW IN NEW YORK



Volume 37, No. 05

May 2026

Shifting Ground: How New Part 375 Changes the Brownfield Landscape

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changes enacted in 2015 and 2022 affecting the Brownfield Cleanup Program (BCP), enhance requirements for the Inactive Hazardous Waste Disposal Site Remedial Program (i.e., State Superfund Program) and the Environmental Restoration Program (ERP), update DEC's soil cleanup objectives (SCOs), and incorporate practical modifications based on DEC's years of experience administering these programs.²

Part 375 has served as the regulatory backbone for DEC's remedial programs for more than two decades. The December 2025 updates to Part 375 (New Part 375) represent the culmination of a decade-long process marked by legislative amendments, regulatory delay, and the incorporation of informal agency policy positions into binding regulations. This article reviews the regulatory history leading to New Part 375, examines several key changes affecting the BCP, and discusses practical considerations for real estate developers operating under the revised framework.

History of Part 375

DEC initially promulgated BCP regulations and consolidated its remedial program regulations under Part 375 in 2006, replacing a patchwork of program-specific rules with a unified framework governing investigation, cleanup standards, institutional and engineering controls, and site closure mechanisms.³ The regulations also formalized the BCP's track-based cleanup

On December 31, 2025, the New York State Department of Environmental Conservation (DEC) adopted long-promised amendments to the Environmental Remediation Program regulations in Part 375 of Title 6 of the New York Codes, Rules and Regulations (Part 375).¹ The amendments implement statutory

¹ See *Environmental Remediation Regulatory Revisions*, N.Y. DEPT. OF ENV'T CONSERVATION (DEC), <https://dec.ny.gov/regulatory/regulations/proposed-emergency-recently-adopted-regulations/environmental-remediation-revisions> (last visited Mar. 4, 2026).

² *Environmental Remediation Regulatory Revisions*, *supra* note 1.

³ See DEC, Job Impact Statement: Amendments to 6 NYCRR Part 375 Environmental Remediation Programs, at 1, <https://dec.ny.gov/sites/default/files/2025-07/sapart375.2025.06.24.pdf> (last visited Mar. 4, 2026).

structure, which established four remedial tracks based on the level of cleanup achieved.⁴ In addition, the 2006 regulations established Certificates of Completion (COCs) as the regulatory closure mechanism granting a State remedial liability shield and eligibility for brownfield redevelopment tax credits, which are comprised of the (i) site preparation credit, (ii) on-site groundwater remediation credit, and (iii) qualified tangible property credit components (collectively, the “Brownfield Tax Credits”).⁵

For nearly a decade, Part 375 remained largely unchanged. DEC first revised the regulations in 2016 to align them with 2015 statutory amendments to Article 27 of the Environmental Conservation Law and the related Tax Law provision concerning the Brownfield Tax Credits. These 2015 statutory amendments (the “2015 Statutory Amendments”) introduced “eligibility gateways” for the tangible property credit component (TPC) of the Brownfield Tax Credits. The eligibility gateways required sites located in New York City to meet certain eligibility criteria, such as being “upside down” or “underutilized,” designated for affordable housing, or located in Environmental Zones (En-Zones).⁶ The Part 375 amendments promulgated in 2016 codified some of these statutory criteria, adding definitions and clarifying the TPC eligibility gateways (collectively, “Former Part 375”).⁷

DEC next proposed revisions to Former Part 375 on December 22, 2021. The proposal sought to more comprehensively implement the 2015 Statutory Amendments, enhance requirements pertaining to the State Superfund Program and ERP, update the SCOs, and incorporate practical modifications to the regulations based on DEC’s experience implementing its remedial programs over the prior decade.⁸ Several aspects of the proposal drew criticism from the regulated BCP community, including a revised definition of site cover system, which would have recognized only soil cover

and not any hardscape (e.g., building foundations, pavers, asphalt) installed during redevelopment,⁹ and a provision requiring *binding* cost estimates for soil cover systems in remedial work plans.¹⁰ The timing of this proposal, issued roughly one year before the BCP’s then-scheduled sunset on December 31, 2022 (i.e., the final date on which new sites could be admitted into the BCP to receive Brownfield Tax Credits upon completion),¹¹ puzzled some practitioners.

The December 2021 proposal ultimately became moot after amendments to the BCP statute on April 9, 2022 (the “2022 Statutory Amendments”), which further modified TPC eligibility requirements, including by adding an eligibility gateway for renewable energy projects; imposed a \$50,000 BCP administrative fee; and extended the effective sunset date for the BCP by 10 years to December 31, 2032, among other things.¹² Because Former Part 375 had last been updated in 2016 and not immediately updated to reflect the 2022 Statutory Amendments, a growing disconnect between the statute and Part 375 regulations emerged. During this period, DEC increasingly advanced interpretive positions through informal agency guidance documents, site-specific project manager determinations, and tax credit eligibility decisions. For instance, although Former Part 375 did not include the \$50,000 BCP administrative fee requirement, DEC began requiring that fee from new BCP applicants via Revision 13 of the BCP application, effective April 25, 2022.

DEC published another Notice of Proposed Rulemaking to amend the Former Part 375 regulations on February 14, 2024,¹³ which was intended to conform Former Part 375 to the 2015 and 2022 Statutory Amendments¹⁴ and to codify several DEC policy interpretations that had developed administratively over the past decade.¹⁵ Among the most significant proposed regulatory changes were expanded off-site investigation obligations for Volunteers;¹⁶

⁴ Track 1 is the most intensive Brownfield Cleanup Program (BCP) remedy, requiring the achievement of unrestricted-use regulatory standards for all environmental media at a site without reliance on engineering or institutional controls. *See* 6 N.Y.C.R.R. § 375-3.8(e)(1). Track 2 requires the soil component of the remedy to achieve use-specific (e.g., residential, restricted-residential, commercial, industrial) soil cleanup objectives (SCOs), as well as the protection of public health, ecological resources, and/or groundwater SCOs where applicable, generally to a depth of 15 feet or to bedrock, and allows for long-term engineering and institutional controls to manage residual groundwater or soil vapor contamination. *See id.* § 375-3.8(e)(2). Track 3 remedies are rarely used but are essentially the same as Track 2 remedies, except that DEC may approve the modification of contaminant-specific SCOs based upon site-specific data. *See id.* § 375-3.8(e)(3). Track 4 requires the achievement of use-specific SCOs, and public health and environmental-protection SCOs, where applicable, only in shallow exposed soils and relies primarily on engineering and institutional controls, including a mandatory site cover system, to manage residual site contamination remaining at depth. *See id.* § 375-3.8(e)(4).

⁵ *See* 6 N.Y.C.R.R. §§ 375-1.6(e)(6), 375-3.8(e); *see also* N.Y. ENV’T CONSERV. LAW (ECL) §§ 27-1415(4), 27-1419(3); N.Y. TAX LAW § 21(2).

⁶ *See* 2015 N.Y. Laws 56, Part BB (2015 N.Y. SB 2006), <https://legislation.nysenate.gov/pdf/bills/2015/S2006B> [<https://perma.cc/5E9Q-8L8S>].

⁷ *See* N.Y. Reg., vol. XXXVI, issue 31, at 2–5 (Aug. 3, 2016) (I.D. No. ENV-23-15-00008-A), <https://dos.ny.gov/system/files/documents/2019/11/080316.pdf>.

⁸ *See* N.Y. Reg., vol. XLII, issue 51, at 6–11 (Dec. 22, 2021) [hereinafter December 2021 Proposal] (I.D. No. ENV-51-21-00003-P), <https://dos.ny.gov/system/files/documents/2021/12/122221.pdf>.

⁹ December 2021 Proposal, *supra* note 8, at 7.

¹⁰ December 2021 Proposal, *supra* note 8, at 7.

¹¹ *See* 2015 N.Y. Laws 56, Part BB (2015 N.Y. SB 2006), <https://legislation.nysenate.gov/pdf/bills/2015/S2006B> [<https://perma.cc/5E9Q-8L8S>].

¹² *See* 2022 N.Y. Laws 58, Part LL (2022 N.Y. SB 8008), <https://legislation.nysenate.gov/pdf/bills/2021/A9008C> [<https://perma.cc/G947-ASWJ>].

¹³ *See* N.Y. Reg., vol. XLII, issue 51, at 8–14 (Feb. 14, 2024) [hereinafter February 2024 Proposal] (I.D. No. ENV-07-24-00016-P), <https://dos.ny.gov/system/files/documents/2024/02/021424.pdf>.

¹⁴ February 2024 Proposal, *supra* note 13, at 8.

¹⁵ February 2024 Proposal, *supra* note 13, at 9.

¹⁶ February 2024 Proposal, *supra* note 13, at 9. A “Volunteer” is “an applicant other than a participant ... whose liability arises solely as a result of ... ownership or operation of or involvement with the site subsequent to the disposal or discharge of contaminants,” subject to certain conditions requiring appropriate care and reasonable steps taken with respect to site contamination. 6 N.Y.C.R.R. § 375-3.2(c)(2).

revised definitions of “Change of Use”¹⁷ and site cover systems;¹⁸ the introduction of “Conditional Track 2” COCs to replace the administratively created “Conditional Track 1”;¹⁹ regulatory limitations on TPC eligibility based on DEC determinations of a site having been “previously remediated” for its “then intended use”;²⁰ and a new TPC eligibility gateway for sites primarily used for renewable energy generation.²¹ The February 2024 proposal prompted extensive public comment from practitioners, developers, environmental organizations, and trade groups, who raised concerns regarding DEC’s statutory authority, the economic feasibility of the proposed regulations, and the erosion of long-standing program incentives.²² On October 16, 2024, DEC issued a Notice of Revised Proposed Rulemaking,²³ which was substantively identical to the February 2024 version except for a couple of slightly updated SCOs,²⁴ indicating DEC’s commitment to the proposed regulatory framework.

The February 2024 proposal that was revised in October 2024 expired under the State Administrative Procedure Act (SAPA) on May 15, 2025.²⁵ Following the 2024 proposal’s expiration, DEC re-noticed the rulemaking on July 2, 2025 and restarted the SAPA process without substantive changes.²⁶ Following a new public comment period and public hearing in October 2025,²⁷ DEC adopted the final Part 375 amendments on December 31, 2025.²⁸ New Part 375 took effect immediately, concluding the multiyear rulemaking process that began with DEC’s 2021 proposal.

Key Changes to BCP in Part 375 Amendments

“Conditional Track 2” and “Modified Track 1” COCs

One of the biggest BCP changes found in New Part 375 is the elimination of “Conditional Track 1,”²⁹ which was an administrative construct not codified in the Former Part 375.³⁰ Under Former Part 375, a BCP site remediated by a Volunteer that achieved an Unrestricted Use soil remedy but still required short-term engineering controls and institutional controls to manage residual groundwater or soil vapor contamination above regulatory standards was awarded a “Conditional Track 1” COC, which could be upgraded to an unconditional Track 1 COC upon a successful demonstration that the residual groundwater and soil vapor impacts fell below regulatory standards within five years of COC issuance.³¹ Volunteers were required to propose an alternative fallback cleanup track (typically Track 2), in the event that an unconditional Track 1 cleanup could not be confirmed within five years of the COC.³² Environmental easements for restricted cleanup tracks generally were to be recorded on title to Conditional Track 1 sites, in the event the initially certified Unrestricted Use remedy reverted to a lower, restricted-use cleanup.³³

New Part 375 replaces this framework with a different structure. Sites that would have received a Conditional Track 1

¹⁷ See February 2024 Proposal, *supra* note 13, at 8.

¹⁸ See February 2024 Proposal, *supra* note 13, at 10.

¹⁹ February 2024 Proposal, *supra* note 13, at 9 (“Provisional Track 1 criteria is eliminated and replaced with a provision that COCs be issued in the appropriate Track but can be upgraded to Track 1 if applicable criteria are met within 5 years.”)

²⁰ February 2024 Proposal, *supra* note 13, at 9. While this proposed language was new to Part 375, the BCP statute already imposed this limitation on TPC eligibility. See ECL § 24-1407(1-a).

²¹ February 2024 Proposal, *supra* note 13, at 9.

²² See generally DEC, Assessment of Public Comment: Revisions to 6 NYCRR Part 375, Environmental Remediation Proposed on February 14, 2024, <https://dec.ny.gov/sites/default/files/2024-10/part375commentassessment.pdf> (last visited Mar. 4, 2026).

²³ See N.Y. Reg., vol. XLVI, issue 42, at 4–8 (Oct. 15, 2024) [hereinafter October 2024 Proposal] (I.D. No. ENV-07-24-00016-RP), <https://dos.ny.gov/system/files/documents/2024/10/101624.pdf>.

²⁴ October 2024 Proposal, *supra* note 23, at 7 (“DEC proposed this rulemaking on February 14, 2024, and received public comments through May 21, 2024. A commenter noted discrepancies between the protection of public health values of two contaminants in the Tables and those published in DEC’s Technical Support Document (TSD). ... DEC is required to issue a revised rulemaking to correct these values as any change to the Tables constitutes a substantive change. No other substantive changes were made.”).

²⁵ See N.Y. Reg., vol. XLVII, issue 22, at 7 (June 4, 2025) (I.D. No. ENV-07-24-00016-RP), <https://dos.ny.gov/system/files/documents/2025/06/060425.pdf>.

²⁶ See N.Y. A.P.A. § 202(2) (subject to certain exceptions, notice of proposed rulemaking expires 365 days following the latter of (i) publication of notice of proposed rulemaking in the State Register or (ii) the date of the last public hearing announcing therein).

²⁷ See generally DEC, Assessment of Public Comment: Revisions to 6 NYCRR Part 375, Environmental Remediation Proposed on July 2, 2025, <https://dec.ny.gov/sites/default/files/2025-12/Part375APCsummary.pdf> (last visited Mar. 4, 2026).

²⁸ See N.Y. Reg., vol. XLVII, issue 52, at 11 (Dec. 31, 2025) (I.D. No. ENV-26-25-00002-A), <https://dos.ny.gov/system/files/documents/2025/12/123125.pdf>; see also *Environmental Remediation Regulatory Revisions*, *supra* note 1.

²⁹ See New Part 375, 6 N.Y.C.R.R. § 375-3.8(e).

³⁰ See Former Part 375, 6 N.Y.C.R.R. § 375-3.8(e)(1), <https://dec.ny.gov/sites/default/files/2026-01/part375rloadopted.pdf> (redline strikeout showing 2015 Regulation versus 2025).

³¹ See Former Part 375, 6 N.Y.C.R.R. § 375-3.8(e)(1)(iii)–(iv); see also *supra* note 4.

³² See Former Part 375, 6 N.Y.C.R.R. § 375-3.8(e)(1)(iv)(c).

³³ See Former Part 375, 6 N.Y.C.R.R. § 375-1.8(g), (h).

COC under the old regime will now receive a “Conditional Track 2” COC in the first instance.³⁴ BCP applicants will still have the opportunity to demonstrate within five years following the COC that groundwater and/or soil vapor conditions have achieved the relevant regulatory criteria, at which point they may petition DEC to upgrade the COC to a “Modified Track 1” COC.³⁵ Until such an upgrade occurs, however, DEC will consider the completed site to have achieved Track 2.³⁶

This change has important tax implications for real estate developers. Under the prior framework, a Conditional Track 1 COC allowed BCP Volunteers to claim the higher site preparation and on-site groundwater remediation tax credits available for a Track 1 remedy at the time the COC was issued. Because Track 1 remedies receive site preparation credits that are at least 10% higher than all other remedial tracks, and achieving Track 1 grants a 5% increase to TPCs for sites that are eligible for that component of the Brownfield Tax Credits,³⁷ Conditional Track 1 provided a meaningful financial incentive for Volunteers to try to achieve Unrestricted Use.

Under New Part 375, however, projects that would previously have received a Conditional Track 1 COC will instead receive a Conditional Track 2 COC and therefore qualify for a lower Track 2 site preparation and on-site groundwater remediation credit percentage at the time of COC issuance.³⁸ It is uncertain whether a Volunteer who successfully petitions DEC to update its COC to Modified Track 1 within the allowable five-year period would be able to retroactively claim the additional site preparation credit differential. The change also affects the TPC component of the Brownfield Tax Credits, as a 5% TPC bonus that a Conditional Track 1 COC holder would have received under Former Part 375 will not be available to the COC holder under New Part 375, unless and until DEC upgrades the COC to Modified Track 1. This presents a new dilemma for developers, who may now want to consider aligning the timing of their temporary certificates of occupancy with their Modified Track 1 COCs, if practicable, to qualify for the 5% TPC bump-up for Track 1.³⁹

Expanded Off-Site Investigation Obligation for Volunteers

Under the BCP, a “Volunteer” did not cause or contribute to the disposal of contaminants at a site but agrees to remediate on-site impacts,⁴⁰ whereas a “Participant” is responsible for site contamination and must remediate resulting off-site impacts as well.⁴¹

All BCP applicants were required to investigate potential on-site impacts under Former Part 375, but Volunteers were exempt from investigating off-site impacts. Instead, Volunteers were required to perform a “qualitative” exposure assessment that did not require any off-site sampling.⁴² New Part 375 expands this requirement, and now Volunteers “may be required” to identify *and sample* potential off-site contamination (including soil, groundwater, and/or soil vapor) to complete the still nominally “qualitative” exposure assessment, if there is a potential off-site exposure pathway,⁴³ though they remain exempt from remediating off-site impacts.⁴⁴ Participants were, and remain, obligated to investigate *and remediate* off-site impacts resulting from the BCP site.⁴⁵ The expanded off-site investigation obligation for Volunteers may result in longer BCP project timelines due to, e.g., the need to secure off-site property access and coordinate field mobilizations with third-party owners to complete the remedial investigation phase of the BCP. These off-site investigatory activities by Volunteers, if included in a DEC-approved investigation work plan, should generate site preparation credits, as they are now “necessary to implement a site’s investigation” along the path to a COC.⁴⁶

Revised Site Cover System Definition

A key feature of New Part 375 is the updated definition and treatment of site cover systems. Under 6 N.Y.C.R.R. § 375-3.2(e), a “cover system or site cover” is now defined as an engineering control comprised of physical barriers, whether soil cover or

³⁴ See New Part 375, 6 N.Y.C.R.R. § 375-3.8(e)(1)(iii). While there are cleanup tracks lower than Track 2, most BCP sites that could theoretically achieve a Conditional Track 1 remedy would also be able to achieve Track 2; accordingly, Track 2 is presumptively the fallback remedy for a Conditional Track 1 site.

³⁵ New Part 375, 6 N.Y.C.R.R. § 375-3.8(e)(1)(iii)(b).

³⁶ New Part 375, 6 N.Y.C.R.R. § 375-3.8(e)(1)(iii)(b).

³⁷ See *Brownfield Cleanup Program Tax Credit Eligibility and Rates*, DEC, <https://dec.ny.gov/environmental-protection/site-cleanup/brownfield-and-state-superfund-programs/brownfield/work-plan-report-documents/brownfield-cleanup-program-tax-credit-eligibility-and-rates> (last visited Mar. 4, 2026).

³⁸ *Brownfield Cleanup Program Tax Credit Eligibility and Rates*, *supra* note 37; see also N.Y. TAX LAW § 21(2), (4) (site preparation credits “shall be allowed for the taxable year in which the effective date of the [COC] occurs” and on-site groundwater remediation credits “shall be allowed in the taxable year such qualified costs are incurred”).

³⁹ TPCs are available “in the taxable year in which the qualified tangible property ... is placed in service,” which the temporary certificate of occupancy establishes. See N.Y. TAX LAW § 21(3)(i).

⁴⁰ See *supra* note 16 and accompanying text; New Part 375, 6 N.Y.C.R.R. § 375-3.2(c)(2).

⁴¹ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(c)(1).

⁴² See Former Part 375, 6 N.Y.C.R.R. § 375-3.8(b)(2)(i)–(ii).

⁴³ See New Part 375, 6 N.Y.C.R.R. § 375-3.8(b)(2)(i).

⁴⁴ New Part 375, 6 N.Y.C.R.R. § 375-3.8(b)(2)(ii).

⁴⁵ See Former Part 375, 6 N.Y.C.R.R. § 375-3.8(b)(2)(iii), (c)(ii); New Part 375, 6 N.Y.C.R.R. § 375-3.8(b)(2)(iii), (c)(ii).

⁴⁶ See N.Y. TAX LAW § 21(2).

hardscape, that prevent exposure to contaminated soil. This reflects a significant change in DEC's approach compared to the 2021 regulatory amendment proposal, as DEC now formally recognizes that certain remedial elements can serve both environmental protection and development needs.

One of the most important changes for developers is the formal recognition of hardscape (e.g., pavement, concrete, building foundations, and slabs) as valid cover system components. Earlier draft regulations focused primarily on soil-only solutions,⁴⁷ but New Part 375 allows these common redevelopment features to count as engineering controls, as long as their thickness meets the New York State Uniform Fire Prevention and Building Code or applicable local building codes.⁴⁸ From a developer's perspective, this long-awaited change confirming that certain aspects of a development count as part of a composite site cover system presents a major benefit for urban brownfield projects, as developers will be able to claim site preparation credits for them. However, project teams must still carefully distinguish *remedial* hardscape costs from purely *development-related* hardscape costs in their BCP work plans and reports, as only remedial elements generate site preparation tax credits.

New Part 375 also sets clear minimum design and depth requirements for soil covers, based on land use and environmental sensitivity.⁴⁹ Commercial and industrial sites require at least one foot of soil meeting the applicable SCOs.⁵⁰ Restricted-residential sites require at least two feet of soil meeting restricted residential SCOs.⁵¹ Sites with identified ecological resources also must maintain a minimum two-foot soil cover, regardless of other land use considerations.⁵² These requirements of the new cover system definition provide BCP project teams with more certainty when designing compliant cover systems, while balancing public health and redevelopment objectives.

On the administrative side, DEC eliminated a previous aspect of its December 2021 proposal that would have required *binding* cost projections for cover systems in the Remedial Action Work Plan (RAWP), which would have capped site preparation tax credits for *soil* cover systems at the projected costs. Elimination of this requirement allows applicants greater flexibility to claim credits based on actual cover-related expenses incurred. While

hardscape is now formally recognized, developers and consultants should expect that claiming Brownfield Tax Credits for these systems will require careful documentation.

Additional TPC Eligibility Gateways for New York City Sites

New Part 375 includes several updates to the eligibility pathways for sites located in New York City to qualify for the TPC component of the Brownfield Tax Credits. Following the 2015 Statutory Amendments, New York City sites have been required to demonstrate eligibility for TPC via certain "gateways," which historically included being located within designated En-Zones, being an affordable housing project, and/or meeting the regulatory definition of "underutilized" or "upside down."⁵³

The definition of "affordable housing project" was expanded in New Part 375 to recognize certain projects that would not have previously qualified.⁵⁴ Projects previously had to be subject to a governmental "regulatory agreement or legally binding restriction" to be recognized as affordable housing.⁵⁵ The former definition presented problems for certain affordable housing projects subject to regulatory programs such as the Affordable New York Housing Program, as it was difficult, if not impossible, to submit a *currently effective* regulatory agreement or binding restriction to DEC ahead of issuance of the COC as required under Former Part 375.⁵⁶ New Part 375 grants additional flexibility by allowing a project that is subject to "a determination by a federal, state or local government housing agency that all or a portion of the project or site *will* qualify for benefits, including but not limited to real property taxation exemptions," or "is *or will* be eligible under an affordable housing program" requiring a percentage of residential units to be dedicated to tenants based on a defined percentage of the relevant area median income.⁵⁷

New Part 375 incorporates the 2022 Statutory Amendments' additional TPC gateways, providing that a project may also qualify for TPC if it is located within a disadvantaged community⁵⁸ and within a designated Brownfield Opportunity Area (BOA),⁵⁹ provided that the project conforms to the applicable BOA revitalization strategy pursuant to the General Municipal Law

⁴⁷ See *supra* note 9 and accompanying text.

⁴⁸ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(e)(2).

⁴⁹ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(e)(3)-(5).

⁵⁰ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(e)(4).

⁵¹ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(e)(5).

⁵² See New Part 375, 6 N.Y.C.R.R. § 375-3.2(e)(3).

⁵³ See *supra* notes 6-7 and accompanying text.

⁵⁴ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(a).

⁵⁵ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(a).

⁵⁶ See N.Y. REAL PROP. TAX. LAW § 421-a(16)(a)(xxii), (16)(o) (an application "shall be filed ... not later than one year after the completion date" of an eligible building, which is marked by the issuance of a temporary or permanent certificate of occupancy).

⁵⁷ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(a) (emphasis added).

⁵⁸ New Part 375, 6 N.Y.C.R.R. § 375-3.2(f) (definition of "disadvantaged community").

⁵⁹ See *generally* *Brownfield Redevelopment*, N.Y. DEPT. OF STATE, <https://dos.ny.gov/brownfield-redevelopment> (last visited Mar. 4, 2026) (providing information about the Brownfield Opportunity Area Program).

as certified by the Secretary of State.⁶⁰ The regulations define disadvantaged communities by reference to the designations established under the State’s Climate Leadership and Community Protection Act.⁶¹

New Part 375 also codifies criteria for BCP projects in New York City seeking to qualify for TPC via the new renewable energy facility gateway.⁶² This gateway was first added for sites accepted into the Brownfield Cleanup Program on or after January 1, 2023, when the TPC eligibility gateways were expanded by statute to also include renewable energy facility sites and certain disadvantaged community sites.⁶³ Under New Part 375, a renewable energy facility site is defined as real property that has a primary use for a renewable energy system or a co-located system storing energy generated from such a system prior to delivery to the bulk transmission or distribution system.⁶⁴ While the underlying statute broadly defines “renewable energy facility site” as real property “that is used for a renewable energy system,”⁶⁵ the regulatory definition further requires that such property “shall be used *primarily* for energy generation.”⁶⁶ Finally, any property primarily used for *fossil fuel-based* energy production is explicitly barred from accessing TPC through the renewable energy facility gateway.⁶⁷

The regulatory requirement for “primarily” renewable energy generation appears to be designed to preclude redevelopment projects with accessory on-site generation uses (e.g., rooftop solar) from qualifying for TPCs through this gateway. However, it remains to be seen how DEC will implement this requirement. Open questions for BCP sites with co-located renewable energy generation and storage resources include how disparate resource types would be compared against each other when determining

a site’s singular, primary use, and what types of multi-resource projects DEC allows to access TPCs through this gateway.

Expanded Change of Use Notice Requirement

The formerly remedial program-specific definitions of Change of Use (COU),⁶⁸ which were largely repetitive, have been consolidated and moved to the general definitions of New Part 375.⁶⁹ DEC also expanded the regulatory definition to include “any change to the tax lot designation or boundary,” which does not appear in the BCP statute’s definition of COU.⁷⁰ Former Part 375 did not require advance COU notices to DEC for tax lot reapportionments, but under New Part 375, BCP practitioners should submit such COUs to DEC upon preliminary local approval of the tax lot modification.⁷¹ Applicants remain obligated to amend their Brownfield Cleanup Agreements (BCAs) to reflect the new tax lot designation once it has been made effective by the municipality.⁷²

New Part 375 also expands the scope of the COU requirement for physical alterations to a BCP site that may affect its remedial program.⁷³ Any proposed physical alteration of a BCP site that has not previously been approved in a work plan by DEC⁷⁴ now requires a COU submission including a “work plan to be approved by” DEC.⁷⁵ Where the proposed activity occurs following issuance of the COC and pursuant to an approved Site Management Plan (SMP), the applicant is not required to submit a COU notice to DEC if they otherwise comply with the SMP notice procedure.⁷⁶ Practitioners should take heed of New Part 375’s expanded COU procedures and submit advance notice to DEC as required, as failure to do so may lead to financial penalties⁷⁷ or other administrative consequences such as BCA termination.⁷⁸

⁶⁰ See New Part 375, 6 N.Y.C.R.R. § 375-3.3(e)(iv); see also N.Y. GEN. MUN. LAW § 970-r(10).

⁶¹ See ECL §§ 75-0101(5), 75-0111(1)(c); *Disadvantaged Communities Criteria*, CLIMATE ACT, <https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria> (last visited Mar. 4, 2026).

⁶² See New Part 375, 6 N.Y.C.R.R. § 375-3.3(e).

⁶³ See *supra* note 12 and accompanying text.

⁶⁴ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(l).

⁶⁵ See ECL § 27-1405(33); see also N.Y. PUB. SERV. LAW § 66-p(b) (defining “renewable energy systems” as “systems that generate electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity”).

⁶⁶ See New Part 375, 6 N.Y.C.R.R. § 375-3.2(l) (emphasis added).

⁶⁷ New Part 375, 6 N.Y.C.R.R. § 375-3.2(l)(2).

⁶⁸ See Former Part 375, 6 N.Y.C.R.R. §§ 375-2.2(a), 375-3.2(e), 375-4.2(b).

⁶⁹ See New Part 375, 6 N.Y.C.R.R. § 375-1.2(e).

⁷⁰ See ECL § 27-1425(3)(a).

⁷¹ See Assessment of Public Comment: Revisions to 6 NYCRR Part 375, Environmental Remediation Proposed on February 14, 2024, *supra* note 22, at 5–6.

⁷² See DEC, Summary of Changes that Require an Amendment to BCA, https://extapps.dec.ny.gov/docs/remediation_hudson_pdf/bcaamendsum.pdf (last visited Mar. 4, 2026).

⁷³ See New Part 375, 6 N.Y.C.R.R. § 375-1.11(d).

⁷⁴ See New Part 375, 6 N.Y.C.R.R. § 375-1.2(e).

⁷⁵ If DEC previously approved the proposed physical alteration, applicants must identify that approved work plan or portion thereof to DEC. New Part 375, 6 N.Y.C.R.R. § 375-1.11(d)(2).

⁷⁶ New Part 375, 6 N.Y.C.R.R. § 375-1.11(d)(3).

⁷⁷ See ECL § 71-2705(1).

⁷⁸ See New Part 375, 6 N.Y.C.R.R. § 375-3.5(c).

Practical Considerations for BCP Practitioners

The adoption of New Part 375 represents the most significant revision to New York’s remedial program framework in nearly two decades. While many of the regulatory amendments codify policies that DEC had already been administratively implementing, their formal incorporation into regulation will affect project planning, risk allocation, and redevelopment economics. BCP developers should carefully consider the revised Conditional Track 2 / Modified Track 1 framework, as the percentage of qualified costs for which they would receive Brownfield Tax Credits depends on the remedial track in place at the time the COC is issued.

New Part 375 may also affect BCP project planning and execution. The expanded off-site investigation obligations for Volunteers could lengthen and complicate the remedial investigation phase, where access to adjacent off-site properties is required, particularly in dense urban areas. An expanded COU requirement means that DEC will be more involved with non-remedial redevelopment activities than it was before. At the same time, the clarifications regarding cover systems and hardscape engineering controls reflect a more practical recognition of how redevelopment projects are actually constructed, though BCP practitioners must continue to carefully document costs and distinguish remedial work from general development activities. Finally, the expanded TPC eligibility gateways, including those related to disadvantaged communities, renewable energy facilities, and affordable housing, reflect the State’s broader effort to align brownfield redevelopment with environmental justice, climate, and housing policy goals. As BCP practitioners begin working under New Part 375, further guidance from DEC—and potentially judicial interpretation—may be needed to clarify how certain provisions will be applied in practice.

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LEGAL DEVELOPMENTS

AIR QUALITY

Appellate Division Rejected Green Amendment Claim to Compel DEC to Take Enforcement Action Against Norlite Facility

The Appellate Division, Third Department affirmed the dismissal of a claim under the New York Constitution’s Green Amendment against the New York State Department of Environmental Conservation (DEC) arising from DEC’s alleged failure to take adequate enforcement action to address fugitive dust emissions from the Norlite, LLC (Norlite) industrial facility in the Town of Colonie and City of Cohoes. Individuals adversely impacted by the fugitive dust emissions and organizations with members adversely impacted intervened as plaintiffs in DEC’s enforcement and public nuisance action against Norlite. The

intervenors filed the Green Amendment cross-claim seeking a declaratory judgment that by permitting the continued operation of the facility in a manner that resulted in fugitive dust emissions, DEC violated their rights to a clean and healthful environment. The intervenors also requested an injunction requiring DEC to rescind Norlite’s permits and to prohibit the resumption of operations. The Third Department distinguished New York’s Green Amendment from environmental rights provisions in other states that require the state to enforce the provision or expressly authorize members of the public to enforce the provision. The Third Department rejected the contention that New York’s Green Amendment created a self-executing substantive right imposing environmental standards beyond the State’s existing regulatory regime. The appellate court further cited precedent holding that a private right of action for violations of the New York Constitution was not available when an alternative remedy such as an Article 78 proceeding is available. In this case, the Third Department found that—as in *Fresh Air for the Eastside, Inc. v. State*, in which the Fourth Department rejected a Green Amendment claim—the intervenors essentially brought an Article 78 proceeding in the nature of mandamus to compel State enforcement action. The Third Department found that because the Legislature gave DEC discretionary enforcement authority rather than imposing a ministerial duty, the intervenors could not use mandamus to compel their desired outcome. *People v. Norlite, LLC*, 2026 N.Y. App. Div. LEXIS 1180 (3d Dept. Feb. 26, 2026). [Editor’s Note: This action was previously covered in the September 2023, October 2023, July 2024, December 2024, and March 2025 issues of *Environmental Law in New York*.]

CLIMATE CHANGE

U.S. Department of Agriculture Agreed to Provide Climate Information to Plaintiffs to Resolve Litigation that Challenged the Removal of Data from Agency Websites

The federal district court for the Southern District of New York so-ordered a stipulation and order of settlement and dismissal in a lawsuit brought in February 2025 against the U.S. Department of Agriculture (USDA) challenging the removal of climate change-related information from the USDA website after President Trump’s inauguration. In May 2025, the parties notified the court that USDA would restore the content. In the February 2026 stipulation setting forth the terms of the dismissal of the case, USDA agreed to provide the plaintiffs with certain data sets used to generate the Forest Service Climate Risk Viewer and to provide certain records created since the publication in April 2023 of an initial inventory of mature and old-growth forests on lands managed by the U.S. Forest Service and the U.S. Bureau of Land Management pursuant to President Biden’s Executive Order 14072, “Strengthening the Nation’s Forests, Communities, and Local Economies.” The records USDA must provide include “records of continued work on the definitions of mature and old-growth forests, the Forest Inventory Growth Stage

System methodology, the special resolution of the inventory, and the data enabling or supporting increased accuracy or a finer spatial resolution.” USDA also agreed to maintain public access to the Climate Risk Viewer until the release of records is completed. *Northeast Organic Farming Association of New York v. U.S. Department of Agriculture*, No. 1:25-cv-01529 (S.D.N.Y. Feb. 24, 2026).

ENERGY

Appellate Division Rejected Town of Fremont’s Appeal of Siting Board Decision on Wind Project

The Appellate Division, Fourth Department confirmed the March 2025 decision of the New York State Board on Electric Generation Siting and the Environment (Board) that adhered to the Board’s July 2024 order allowing Baron Winds LLC and Baron Winds II LLC (together, Baron Winds) to amend the Certificate of Environmental Compatibility and Public Need (certificate) with respect to the second phase of construction of a wind-powered electric generating facility in the Town of Fremont in Steuben County. The Town sought to set aside portions of the rehearing decision. The court rejected Baron Winds’ contention that the proceeding was moot due to the completion of the second phase and the Town’s failure to seek injunctive relief. The Fourth Department found that the record established that Baron Winds was placed on notice that construction of the second phase would be undertaken at their own risk during the pendency of the Town’s petition for rehearing and that the Town opposed construction during the pendency of the petition, objected to the Board’s delay, and did not itself delay in commencing this challenge. The Fourth Department also found that the circumstances did not warrant application of the doctrine of laches. On the merits, the Fourth Department rejected the Town’s argument that the Board violated Public Service Law § 170(1) by failing to timely decide the application for rehearing. The court determined that the Town was not entitled to relief because the statute’s time limitation was “directory only, not mandatory.” The court also found that the Town “failed to show that it suffered substantial prejudice from the minimal delay.” The Fourth Department further found that the Board did not act arbitrarily or capriciously or abuse its discretion when it clarified in the rehearing decision that it did not intend in its July 2024 order to set a more restrictive setback than what was required under local law (1,500 feet measured from any non-participating residence). In addition, the court found that it was not arbitrary and capricious or an abuse of discretion for the Board to allow Baron Winds to operate the second phase at a generating capacity of 117 megawatts without amending the certificate where the combined operative generating capacity of the two phases would not exceed the total maximum generating capacity in the certificate, even though the first phase ultimately operated at a lower maximum generating capacity than was authorized. The Fourth Department also rejected the Town’s contention that the Board unlawfully waived local laws regarding setbacks and turbine height restrictions. The court said

the argument that the Public Service Law authorizing the Board to waive application of local law violated the home rule provision of the New York Constitution was without merit. The court also found that the Board was not arbitrary or capricious and did not abuse its discretion when it found that the local law’s height restrictions would be unduly burdensome and that no waiver of the 1,500-foot setback requirement was necessary. *Matter of Town of Fremont v. New York State Board on Electric Generation Siting & the Environment*, 2026 N.Y. App. Div. LEXIS 739 (4th Dept. Feb. 11, 2026).

HAZARDOUS SUBSTANCES

Owner of Sports Complex Site Agreed to Dismissal of Private Nuisance Action After Chemical Company Purchased the Property

After the parties filed a stipulation of voluntary dismissal, the federal district court for the Western District of New York dismissed an action brought in 2021 by a real estate development company that owned 10 properties bordering a PVS Chemical Solutions, Inc. (PVS) plant in the City of Buffalo. The company asserted a private nuisance claim against PVS based on allegations that emissions incidents “placed a negative stain” on an athletic complex that the company developed after remediating the property through the Brownfield Cleanup Program (BCP). In January 2025, the court denied PVS’s motion for summary judgment on the private nuisance claim, accepting a magistrate judge’s report and recommendation. The magistrate judge had concluded that PVS did not demonstrate as a matter of law that the company lacked the right to use the property as a private sports complex pursuant to the environmental easement executed by the company and the State of New York in connection with the company’s remediation of the property under the BCP. The voluntary dismissal of the case followed PVS’s purchase of the sports complex property on January 30, 2026, as reported by *Buffalo Rising*. *South Buffalo Development LLC v. PVS Chemical Solutions Inc.*, No. 1:21-cv-01184 (W.D.N.Y. Feb. 12, 2026). [Editor’s Note: This action was previously covered in the September 2023 issue of *Environmental Law in New York*.]

LAND USE

Appellate Division Rejected Water District’s Appeal in Challenge to Town of North Hempstead’s Authority to Regulate Installation of Emerging Contaminant Treatment Systems

The Appellate Division, Second Department affirmed the Supreme Court’s denial of the Albertson Water District’s motion for leave to renew a motion for summary judgment in the District’s action asserting that its plans for water treatment facilities at its three plant sites were immune from the Town of North Hempstead’s zoning and building regulations. The District obtained New York

State Department of Health and Nassau County Department of Health approval in 2020 to install a granular activated carbon treatment system to address emerging contaminants at one of the plants and had plans to install treatment systems at another plant. The Town issued a stop work order and demanded that the District apply for a building permit. In the District's action, the Town argued that it did not seek to enforce its zoning code but that the District was not exempt from the New York State Uniform Fire Prevention and Building Code. The Supreme Court denied the District's summary judgment motion in March 2023 and denied the District's motion for leave to renew in January 2024. The Second Department found that the Supreme Court properly denied the motion for leave to renew, noting that the majority of evidence supporting the motion was dated prior to the original summary judgment motion and that the District did not present a "reasonable justification for failing to present these alleged new facts on the prior motion." In addition, the Second Department found that the District did not demonstrate that evidence that post-dated the original motion, including plan approvals, would change the prior determination. The Second Department noted that the plan approvals required that the District's projects be "constructed in accordance with all applicable Federal, State and local regulations" and stated that "separate approval from the local Building Department" might be required. *Albertson Water District v. Town of North Hempstead*, 2026 N.Y. App. Div. LEXIS 1166 (2d Dept. Feb. 25, 2026).

Appellate Division Affirmed Dismissal of Property Owner's Constitutional Challenges to City of Yonkers' Rezoning of Property from Commercial to Residential

The Appellate Division, Second Department affirmed the dismissal of claims against the City of Yonkers by the owner of an undeveloped property for which the City changed the zoning from commercial to residential in June 2014. The owner had entered into a contract in February 2023 to sell the property to a purchaser that intended to use the property for a transportation service business. The purchaser canceled the contract pursuant to its governmental approvals contingency clause after the Yonkers Planning Board denied site plan approval in December 2013 and the City rezoned the property. The Second Department first found that the Supreme Court, Westchester County properly granted summary judgment to the City on the plaintiff's substantive due process claim because the City established that the plaintiff did not have a vested property interest in the commercial use of the property since no construction had begun prior to the zoning ordinance's effective date. The court rejected the plaintiff's contentions that its property interest in commercial use vested under the doctrine of equitable estoppel. Next the Second Department found that the Supreme Court properly granted summary judgment to the City on the plaintiff's procedural due process claim since the plaintiff did not have a vested property interest in the commercial zoning classification. Third, the Second Department found that the Supreme Court properly dismissed causes of action

alleging inverse condemnation and unconstitutional taking. The Second Department found that the rezoning did not interfere with investment-backed expectations since the sale had not yet closed and there was no indication that there had been significant investment in the property based on its commercial zoning. In addition, the court found that the governmental action was "not a physical intrusion but was regulatory in nature" and that the rezoning "did not deprive the property of economic value to such a degree that a taking was effected." The Second Department also affirmed the Supreme Court's denial of the plaintiff's motion for leave to renew, finding that the plaintiff did not provide reasonable justification for failing to present allegedly new facts in its original motion. *Dagro Associates, LLC v. City of Yonkers*, 2026 N.Y. App. Div. LEXIS 1130 (2d Dept. Feb. 25, 2026).

Appellate Division Upheld Denial of Area Variance for Subdivision in Village of Port Jefferson Where Both Lots Were Previously Owned by Petitioner LLC

The Appellate Division, Second Department found that the Supreme Court, Suffolk County properly dismissed an Article 78 proceeding seeking review of the Village of Port Jefferson Zoning Board of Appeals' (ZBA's) denial of area variances for the subdivision of a parcel into two lots. The lots had been held in common ownership "for a substantial period" until the petitioner and a separate limited liability company (LLC) each purchased one of the lots. The sole member of the petitioner was also the sole member of the other LLC. The Second Department found that the ZBA rationally concluded that the lot-size variances were substantial in nature. The court also found that granting the variances would have set a negative precedent and that the record established that the petitioner's hardship was self-created since the petitioner's sole member was "abundantly aware" that the two lots had been held in common ownership and had therefore merged by operation of law. *Matter of Little Harbor Partners, LLC v. Village of Port Jefferson Zoning Board of Appeals*, 2026 N.Y. App. Div. LEXIS 609 (2d Dept. Feb. 4, 2026).

Appellate Division Annulled Certificate of Occupancy for Restaurant in City of Rye, Remitted for Nonconforming Use Determination

The Appellate Division, Second Department reversed a decision of the Supreme Court, Westchester County upholding a City of Rye Board of Appeals determination upholding issuance of a certificate of occupancy for a restaurant. The Second Department noted that there was no dispute that the property on which the restaurant was located did not meet requirements for full-service restaurants in the Code of the City of Rye, which required that such establishments be situated "on a lot having frontage on an arterial highway or a county road as designated on September 1, 1958, and more than 150 feet from a residence district." The Second Department therefore held that the Board of Appeals determination was affected by an error of law and must be annulled. The Second

Department directed that the matter be remitted to the Board of Appeals to consider whether the restaurant use was a preexisting nonconforming use or whether the preexisting nonconforming use lapsed due to renovation work. *Matter of Cutner v. City of Rye Board of Appeals*, 2026 N.Y. App. Div. LEXIS 601 (2d Dept. Feb. 4, 2026).

Appellate Division Affirmed Dismissal of Waterfront Property Neighbors' Claim Seeking Injunction Blocking Work on Groin

The Appellate Division, Second Department found that the Supreme Court, Nassau County properly dismissed a cause of action brought by owners of waterfront property in the Town of Oyster Bay for a permanent injunction enjoining neighboring property owners from performing work on a groin that extended into the water and that the plaintiffs alleged was located on their property. The Second Department found that the defendants established prima facie entitlement as a matter of law with evidence showing that they had abandoned plans to replace the existing groin and instead had constructed a new groin that was entirely on their property. The defendants also demonstrated that “no further construction work was needed or planned” and that an injunction therefore would have no practical effect. The Second Department further found that the plaintiffs failed to raise a triable issue of fact, rejecting their contention that an exception to the mootness doctrine applied. The Second Department also granted the defendants’ motion for leave to discontinue four counterclaims without prejudice, finding no evidence that the plaintiffs would be prejudiced or that the defendants were attempting to avoid an adverse determination by discontinuing those counterclaims. *Matter of Golden v. Town Board of the Town of Oyster Bay*, 2026 N.Y. App. Div. LEXIS 572 (2d Dept. Feb. 4, 2026).

In Dispute over 2010 Certificate of Occupancy for Ocean Beach Residence, Appellate Division Affirmed Order Requiring Access for Inspection and Denial of Preliminary Injunction Reinstating COO

In an Article 78 proceeding in which the petitioner sought to compel the Incorporated Village of Ocean Beach to reinstate the 2010 certificate of occupancy (COO) for a residence, the Appellate Division, Second Department found that the Supreme Court, Suffolk County had properly granted the Village’s cross-motion for an order directing the petitioner to provide the Village Building Inspector with access to the property for an inspection. The Second Department also affirmed the denial of the petitioner’s motion for a preliminary injunction, finding that the petitioner did not demonstrate the “extraordinary circumstances” necessary to justify preliminary relief that was equivalent to the ultimate relief sought by the petitioner. The Village had argued that an inspection was needed in order for the Village Board of Trustees to conduct

a public hearing and make a new determination on revocation of the certificate of occupancy as required by a March 2021 order in an earlier lawsuit regarding the validity of the 2010 certificate of occupancy. In the March 2021 order, the court determined that the Village had failed to make a final determination as to revocation after a 2014 hearing that resulted in a report and recommendation to the Village Mayor and Village Board of Trustees finding that the certificate of occupancy had been issued in error and should be revoked. *Matter of Potter v. Incorporated Village of Ocean Beach*, 2026 N.Y. App. Div. LEXIS 591 (2d Dept. Feb. 4, 2026).

State Supreme Court Stayed Consideration of Hofstra University Fees Request in Dispute over Nassau Coliseum Lease

In November 2023 and August 2025, the Supreme Court, Nassau County awarded Hofstra University attorneys’ fees and costs after Hofstra succeeded on claims under the Freedom of Information Law (FOIL) and the Open Meetings Law against Nassau County respondents in connection with County approvals of the transfer of leases for the Nassau Veterans Memorial Coliseum and an adjoining parcel for the planned development of a casino project. On September 10, 2025, Hofstra moved for attorneys’ fees and costs in the amount of \$1,147,461.56 pursuant to these earlier decisions. The County respondents opposed the motion and asked the court to stay briefing until the Appellate Division, Second Department resolves their appeal of the August 2025 decision. The County respondents argued, among other things, that the determination as to attorneys’ fees was likely to be reopened because an Appellate Division judge had “made clear at oral argument” on the appeal of the November 2023 decision that she believed Hofstra failed to establish a violation of the Open Meetings Law. In a decision dated January 20, 2026, the Supreme Court determined that a stay was appropriate given the pending appeal and denied Hofstra’s motion with leave to renew at an appropriate juncture. The Supreme Court further wrote that “[t]his Court would be remiss, however, not to address the County respondents’ reliance on a statement made” by the Appellate Division judge during oral argument. The Supreme Court wrote that counsel for the County respondents had “misdirected” the Second Department panel to statutory language in FOIL to argue that the Open Meetings Law did not require the Nassau County Planning Commission to prepare a draft resolution for the public to view prior to voting on the resolution. The Supreme Court stated that in its view imputing the FOIL language to the Open Meetings Law provision would violate canons of statutory construction. *Matter of Hofstra University v. Nassau County Planning Commission*, Index No. 606293/2023 (Sup. Ct. Nassau County Jan. 20, 2026). [Editor’s Note: This case was previously covered in the February 2024, May 2024, January 2025, August 2025, and November 2025 issues of *Environmental Law in New York*.]

MINERAL RESOURCES

Appellate Division Upheld DEC Determination that Mineral Rights Owner Was Obligated to Plug Unknown Wells

The Appellate Division, Fourth Department upheld DEC's determination that a petitioner who owned subsurface mineral rights on two parcels of land was responsible for plugging 19 previously unknown wells on the parcels. The Fourth Department cited provisions of the Environmental Conservation Law and DEC regulations providing that both the "owner" and "operator" of a parcel of land from which oil and gas have been extracted are responsible for plugging abandoned wells on that parcel. The court also cited provisions defining "owner" as "the person who has the right to drill into and produce from a pool or a salt deposit and to appropriate the oil, gas, or salt [they] produce[] either for themselves or others" and "operator" as "any person who is in charge of the development of a lease or the operation of a producing well." The Fourth Department found that the petitioner "held exclusive mineral rights leases for the parcels of land" on which the unknown wells were located and was also the operator of the known wells on those parcels. The court therefore found that DEC's determination that the petitioner was obligated to close the wells was supported by substantial evidence in the record and was rational. *Matter of Miller v. Mahar*, 2026 N.Y. App. Div. LEXIS 772 (4th Dept. Feb. 11, 2026).

SEQRA/NEPA

State Supreme Court Said Neighboring Property Owner Was Likely to Succeed on SEQRA Challenge to Village of Southampton's Modification of Type I List but that SEQRA Challenge to Subdivision Was Not Ripe

The Supreme Court, Suffolk County granted a property owner's request for a preliminary injunction barring enforcement of a Village of Southampton local law removing the issuance of wetlands permits from the Village's list of designated Type I actions under the State Environmental Quality Review Act (SEQRA), which are actions more likely to require preparation of an environmental impact statement. The court denied, however, the property owner's request for a preliminary injunction enjoining the Village of Southampton respondents from proceeding with the review process for the preliminary plat subdivision application submitted by a developer for a neighboring property. The court found that the challenge to the negative declaration for the preliminary subdivision application was not ripe because the Village had not made a final decision approving the preliminary subdivision. Regarding the local law amending the Type I list, the court found that the property owner was likely to prevail on its claim that the Village failed to comply with SEQRA when it adopted the law. The court noted that the date of the negative declaration was the same day as the approval

vote for the local law; that the discussion of both matters was only two transcript pages, with no discussion of environmental issues; and that the Village Mayor did not sign environmental documents that the court referred to as "EIS Parts II and III," so there was no proof that they were reviewed by the Trustees. The court also found that the equities favored a preliminary injunction with respect to the local law since the developer did not object to the injunction and the Village would not be prejudiced "by continuing to be governed by a preexisting longstanding statute." *91 Fowler LLC v. Incorporated Village of Southampton*, 2026 N.Y. Misc. LEXIS 779 (Sup. Ct. Suffolk County Feb. 17, 2026).

TOXIC TORTS

Appellate Division Reversed Order Referring Farm's Stray Voltage Tort Case to Public Service Commission

In a tort action brought by the owners of a cattle and dairy farm in the City of Johnstown against Niagara Mohawk Power Corporation (Niagara Mohawk's) for allegedly causing stray voltage on the farm property, the Appellate Division, Third Department reversed the decision of the Supreme Court, Fulton County granting Niagara Mohawk's motion to stay the case and refer it to the New York State Public Service Commission (PSC) pursuant to the primary jurisdiction doctrine. The Supreme Court ordered the PSC to address issues related to whether Niagara Mohawk's electrical distribution system produced harmful levels of stray voltage at the farm requiring mitigation, how best to remediate or mitigate the condition, and other related issues that the PSC might determine were within its purview. In the appeal, the PSC filed an amicus curiae brief in support of the farm owner. The Third Department acknowledged that the PSC "has broad regulatory authority over whether utilities are safely furnishing services, such as electricity," but agreed with the farm owners and the PSC that referral to the PSC was not warranted. The Third Department said that even if the regulatory scheme were "an appropriate means to address some of the issues underlying these tort claims ... , compliance with regulatory standards is not dispositive as to due care." The Third Department found that the PSC's assertions and the farm owner's expert opinions and reports established that the duty of care "may be quite different from this regulatory floor." The court also noted that the PSC had no expertise on the impact of stray voltage on cattle. The Third Department said it was "sensitive" to the Supreme Court's needs in a case that involved "clearly quite complex" subject matter but found that the farm's claims required determinations that were "inherently judicial"; the Third Department also noted that the Supreme Court had authority to appoint a referee or neutral expert where appropriate. The Third Department further found that there was "no threat of inconsistent adjudications" or a need to coordinate between the judicial and executive branches of government. *Frasier v. Niagara Mohawk Power Corp.*, 2026 N.Y. App. Div. LEXIS 1196 (3d Dept. Feb. 26, 2026).

WATERS

Federal Court Rejected Broad Definition of “Production Area” in Clean Water Citizen Suit Against Dairy Farm

In a Clean Water Act citizen suit brought by the nonprofit organization Center for Food Safety, Inc. (Food Safety) against Wood Farms, LLC (Wood Farms), the owner of a dairy facility in Clayton, the federal district court for the Northern District of New York denied Food Safety’s motion for partial summary judgment. Food Safety alleged that pollutants from the facility’s “production area” were reaching the farm’s inlets and polluting navigable waters of the United States. The court found that there was no genuine issue of material fact as to which areas of the facility were the “production area.” The court found that the U.S. Environmental Protection Agency’s regulations for concentrated animal feeding operations (CAFOs) created four “designated-static areas”—animal confinement, manure storage, raw materials storage, and waste containment—that constituted the production area. The court further concluded that the regulation’s drafters created the “four broad sections” to show that not all parts of an animal feeding operation (AFO) are considered part of the production area. The court also found that the regulation’s structure supported this reading because the regulation defined a separate broader term, the “land application area.” The court rejected Food Safety’s arguments that the farm’s inlets were within the production area either because all land under the control of an AFO owner was part of the production area or because the defendant uses equipment that tracks pollutants across the AFO, thereby extending the production area. The court also rejected Wood Farms’ argument that land application areas are not part of CAFOs. The court granted summary judgment to Wood Farms on the “production area” issue but declined to rule on the questions of whether discharges from the production area and the “vegetative treatment area” were reaching navigable waters of the United States and whether Wood Farms’ defenses applied. The court concluded that these issues were better left to the fact finder to resolve. *Center for Food Safety, Inc. v. Wood Farms, LLC*, 2026 U.S. Dist. LEXIS 31320 (N.D.N.Y. Feb. 17, 2026).

NEW YORK NEWSNOTES

Chapter Amendments Modified 2025 Laws on Extended Producer Responsibility for Rechargeable Batteries, Chemicals in Menstrual Products, and More

On February 13, 2026, Governor Kathy Hochul signed chapter amendments affecting various environment- and energy-related laws enacted in 2025:

- **Monarch Preservation Plan.** The chapter amendments were intended to clarify and ensure consistent terminology in the new Section 11-0541 of the Environmental Conservation

Law requiring DEC to take “feasible actions to conserve monarch butterflies and the unique habitats they depend upon for successful migration.” The chapter amendments explicitly require DEC to consider “identifying alternatives” to harmful pest management practices, including alternatives to the use of pesticides. The amendments also changed “agricultural non-cropped lands” to “lands that are not in active production” in a provision regarding partnerships to create, restore, or enhance monarch butterfly habitat. (Chapter 7)

- **Native plants program.** The chapter amendments modified the native plants program created by the 2025 law so that the Department of Agriculture and Markets would not be required to certify plants for their quality, which Governor Hochul said would not be feasible. (Chapter 24)
- **Mechanical insulation energy savings program.** The chapter amendments modified the law to give the New York State Energy Research and Development Authority (NYSERDA) discretion to include public housing or public hospitals in the program, rather than automatically including them. Other changes included the addition of language requiring that NYSERDA establish a program to issue “competitive grants on a first come first served basis.” Instead of covering 100% of qualified mechanical insulation expenditures, the amended law specified that the grants will cover at least 50% but not more than 75% of such expenditures. The chapter amendments authorized NYSERDA to coordinate with another State agency or authority to establish and administer the program and directed NYSERDA to publish guidelines establishing the evaluation criteria and competitive application process for the program. (Chapter 25)
- **Restrictions on chemicals in menstrual products.** The chapter amendments modified Section 399-aaaa of the General Business Law to define “restricted substance” to encompass a set list of chemicals rather than defining it to mean “an unsafe chemical for inclusion in menstrual products as determined by the commissioner of health,” including a set list of chemicals. The chapter amendments also eliminated provisions of the 2025 law that would have tasked the Department of Health (DOH) with establishing, in consultation with DEC, the lowest level of a restricted substance that can be feasibly achieved and with conducting a review of those levels every five years. Instead, the law’s prohibition applies only to restricted substances present as an intentionally added ingredient at any level. In her approval memorandum for the 2025 law, Governor Hochul indicated that DOH and DEC did not have sufficient resources for the additional work and that those portions of the legislation therefore would more appropriately be considered in the context of the State budget. (Chapter 31)

- **Office of Parks, Recreation and Historic Preservation (OPRHP) operational safety plans.** The chapter amendments modified the new Section 3.16 of the Parks, Recreation and Historic Preservation Law requiring that OPRHP develop and approve operational safety plans prior to deployment of any employee in “hazardous conditions,” which include natural disasters and extreme weather. The amendments provide for flexibility to follow “incident specific” procedures and plans. (Chapter 48)
- **Enforcement relief for weekend violations of time requirements for setting out residential refuse for collection in New York City.** The 2025 law limited New York City Department of Sanitation’s (DSNY’s) authority to enforce violations of requirements for setting out residential refuse for collection, when the violation occurs between 3 PM on Friday and 6 PM on Saturday and is for placing refuse, solid waste, or recyclable material out for collection earlier than allowed by DSNY. Now this limitation only applies if the associated community board adopts a resolution requesting early Friday set out of solid waste or recyclable material. (Chapter 82)
- **Prohibition on taking of horseshoe crabs.** The chapter amendments to the 2025 law’s prohibition on the take of horseshoe crabs, including for commercial or biomedical purposes, phase in the restrictions on harvesting over a three-year period from 2026 through 2028. (Chapter 83)
- **Extended Producer Responsibility Law for Rechargeable Batteries.** Most of the chapter amendments to this law were intended to address fire safety concerns regarding rechargeable batteries from electric scooters or bicycles with electric assist. The chapter amendments (1) made it voluntary for retailers to accept batteries from electric scooters or bicycles with electric assist; (2) provided that only retailers that sell electric scooters or bicycles with electric assist or their batteries may accept such batteries; (3) limited retailers to taking five such batteries per day from any person; and (4) prohibited acceptance of such batteries if they are damaged, defective, or recalled. The chapter amendments also specified requirements for battery manufacturers’ plans for collecting, transporting, and recycling rechargeable batteries for electric scooters and bicycles with electric assist and required that when reviewing such plans, DEC must solicit input from the Office of Fire Prevention and Control in the Division of Homeland Security and Emergency Services and, for plans related to New York City, the New York City Fire Department. Other changes included adding manufacturers of electric scooters or bicycles with electric assist to the definition of “battery manufacturer” if no other party has responsibility for compliance with the law. The chapter amendments also clarified that the law applies only to rechargeable batteries weighing less than 50 pounds. Other changes to the 2025 law

included public education requirements and the addition of a requirement for DEC to publish a report by January 1, 2031 examining voluntary collection by retailers of rechargeable batteries from electric scooters or bicycles with electric assist and making recommendations to the Legislature for any changes to the law. The chapter amendments also required New York City to share information with DEC regarding enforcement. (Chapter 87)

[*Editor’s Note:* The original legislation modified by these chapter amendments was covered in the December 2025 and March 2026 issues of *Environmental Law in New York*.]

DEC Released New Policy on Tidal Wetlands Enforcement for Public Comment

In the February 18, 2026 issue of the *Environmental Notice Bulletin*, DEC published notice of its publication of a draft tidal wetlands enforcement policy. The policy’s goal is to facilitate enforcement responses that accomplish restoration of tidal wetland values and benefits lost as a result of illegal activity; appropriately punish those who violate the Tidal Wetlands Act; deter future violations; and assure that no economic gain is derived from failure to comply with the law. The policy supersedes DEE-7, “Tidal Wetlands Enforcement Policy,” which was issued on February 8, 1990. Responsibility for the interpretation and update of the new policy will reside with the Office of General Counsel. The policy describes enforcement procedures, including how an enforcement proceeding is initiated, how cases are managed, and how appropriate penalties are determined. The draft policy includes a tidal wetlands-specific penalty matrix. Similar to DEE-7, the policy also includes guidance with respect to specific enforcement and compliance issues: removal of illegal structures, map boundary accuracy, settlement by order on consent, court litigation versus administrative process; enforcement against state agencies/municipalities; violations by prior landowners; and bonds. DEC took comment on the policy through March 20, 2026.

DEC Sought Public Comment on Revised Draft General Permit for Management of Invasive Species

In the February 18, 2026 issue of the *Environmental Notice Bulletin*, DEC published notice that it was accepting public comments on a revised draft of a reissued Management of Invasive Species General Permit (GP) (GP-0-21-004). DEC previously accepted comments on an earlier draft in February 2025. In response to comments on that draft, DEC said it was proposing additional authorized activities and providing clarification regarding permitted harvesting methods and the applicability of the permit to terrestrial, upland environments. The general permit authorizes management of invasive species using nine categories of techniques within State-regulated freshwater wetlands and freshwater wetland adjacent areas; bed or banks of State-protected streams; navigable waters of the State; and State-designated Wild, Scenic, or Recreational River areas. DEC accepted comments on the revised draft through March 11, 2026. The draft permit is available at <https://dec.ny.gov/sites/default/files/2025-02/draftgp025008mngmntinvspecies.pdf>.

Public Service Commission Approved Rules for Permitting Major Renewable Energy Facilities and Major Electric Transmission Facilities

On February 12, 2026, the New York State Public Service Commission (PSC) approved regulations for the streamlined environmental review, permitting, and siting of major renewable energy facilities and major electric transmission facilities under the Renewable Action Project Interconnection and Deployment (RAPID) Act. The RAPID Act, which was enacted in April 2024 as part of the budget law, consolidated review of major renewable energy facilities and major electric transmission facilities in the Office of Renewable Energy Siting and Electric Transmission (ORES) and authorized ORES to adopt regulations subject to PSC approval. The regulations approved by the PSC on February 12 repealed the existing 16 N.Y.C.R.R. Part 1100, which concerned only renewable energy generation facilities and which ORES originally adopted as 19 N.Y.C.R.R. Part 900 in 2021 when ORES was part of the Department of State. The regulations approved by the PSC also adopted three new parts: 16 N.Y.C.R.R. Parts 1100 (general procedural requirements), 1101 (substantive requirements for major renewable energy generation facilities, including uniform standards and conditions for permits), and 1102 (substantive requirements for major electric transmission facilities, including uniform standards and conditions for permits). In response to comments on ORES's October 2025 revised proposal, ORES revised the final regulations to clarify pre-application procedures, as well as procedures for alternative route scoping for major electric transmission facilities and for upgrades to major electric transmission facilities within existing rights of way. Other changes in the final regulations included replacing the term "environmental justice area" with the term "disadvantaged communities" for consistency with the Climate Leadership and Community Protection Act and clarification of noise standards for both major renewable energy facilities and major electric transmission facilities.

Public Service Commission Launched Proceeding for Consideration of Interconnection Issues for Data Centers and Other Large Loads

At its February 12 meeting, the PSC also instituted a proceeding to execute Governor Hochul's Energize NY Development initiative, which she announced in a State of the State Address on January 13, 2026 as a means to address how large loads connect to the electric grid and to ensure that projects such as data centers pay their fair share of associated costs. The PSC identified the following six objectives for the proceeding, which is formally known as Case 26-E-0045, "Proceeding on Motion of the Commission to Address Interconnection Reforms for Large Loads": (1) modernize the interconnection process for all building loads; (2) improve transparency and predictability related to grid upgrades; (3) ensure that data centers and similar facilities bear the cost they impose on the electric system; (4) provide for the continued reliability of the electric system; (5) develop programs and policies for the interconnection of large loads that consider the objectives of the Climate Leadership and Community Protection Act; and (6) explore ways in which new large electric

load could lead to downward pressure on rates for all customers. The PSC directed Department of Public Service staff to prepare a whitepaper within one year "detailing the range of issues associated with large load interconnection." Stakeholders were invited to submit initial comments by April 13, 2026 on eight questions, including what interconnection rules would allow for leveraging of waste heat as part of thermal energy networks and what requirements should apply to large loads or data centers to maintain grid reliability, protect ratepayers, and achieve New York's climate goals.

New York City Adopted Noise Monitoring Requirements for Large Construction Sites Where After-Hours Work Occurs

Noise monitoring requirements took effect on April 21, 2026 in New York City for certain construction sites located within 50 feet of a residential receptor. The requirements apply to construction sites of 200,000 or more square feet that will have ongoing after-hours construction for at least 30 days. The adopted rule requires that readings be taken 24 hours a day for the duration of the project and that the data collected be transmitted to the New York City Department of Environmental Protection at least once every hour. The regulations also include specifications regarding the location and features of the monitoring devices. The requirements do not apply to construction sites for buildings in which all dwelling units will be affordable housing units or to emergency work. The requirements are codified at 15 R.C.N.Y. § 28-101(o)-(r).

WORTH READING

Jack Carroll & Colin Kinniburgh, *How a More Flexible Grid Could Save New York Billions*, N.Y. Focus (Feb. 18, 2026), <https://perma.cc/QPC5-5ZM9>

Chris Dunn, *Celebrating and Mourning Urban-Planning Legal Landmarks*, N.Y.L.J. (Mar. 12, 2026), <https://perma.cc/9JTZ-6VFP>

Michael B. Gerrard, *New York Environmental Legislation in 2025*, N.Y.L.J. (Feb. 26, 2026), <https://perma.cc/SCZ5-QQXE>

Bennett L. Gershman, *Does Trump Care About Cancer-Causing Pesticides in Our Food?*, N.Y.L.J. (Feb. 24, 2026), <https://perma.cc/8VCR-KNDH>

N.Y.C. Env't Justice Alliance, *A Reset for Renewable Rikers* (Feb. 2026), <https://perma.cc/KD6C-FK7V>

Daniel Spitzer & Jenna Rackerby, *NYC Energy Storage Guidance Clarifies Compliance Pathways*, Law360 (Feb. 25, 2026), <https://perma.cc/7NBU-SB7K>

UPCOMING EVENTS

May 6, 2026

Oil Spill Symposium, Hosted by New York State Bar Association (NYSBA) Environmental & Energy Law Section, Hybrid Event at NYSBA Bar Center, 1 Elk Street, Albany, and on Zoom. For information, see <https://nysba.org/committees/environmental-energy-law-section/>.

May 7, 2026

Annual Legislative Forum, Hosted by NYSBA Environmental & Energy Law Section, NYSBA Bar Center, 1 Elk Street, Albany. For information, see <https://nysba.org/committees/environmental-energy-law-section/>.

May 12–14, 2026

Capture the Energy 2026, Hosted by NY-BEST, Albany Capital Center, Albany. For information, see <https://ny-best.org/mpage/cte26overviewmicrosite>.

May 21, 2026

Day in the Life of an Environmental & Energy Lawyer, Hosted by NYSBA Environmental & Energy Law Section and Young Lawyers Section, Webinar. For information, see <https://nysba.org/committees/environmental-energy-law-section/>.

June 4–5, 2026

2026 Long Island Sound Research Conference, Mystic, Connecticut. For information, see <https://seagrant.uconn.edu/2026/01/21/save-the-date-for-2026-long-island-sound-research-conference/>.

June 8–11, 2026

State of the Science on Offshore Energy, Wildlife, and Fisheries, Hosted by the New York State Energy Research & Development Authority (NYSERDA) on behalf of the Offshore Wind Environmental Technical Working Group and the Fisheries Technical Working Group (F-TWG), Stony Brook University, 100 Nicolls Road, Stony Brook. For information, see <https://www.nyetwg.com/2026-workshop>.

June 16–17, 2026

Energy Council New York 2026, New York City. For information, see <https://energycouncil.com/event-events/newyork/>.

June 18, 2026

Energy Summit and Trade Expo, Hosted by the Brooklyn Chamber of Commerce, Dock 72, Brooklyn Navy Yard. For information, see <https://brooklynchamber.zohobackstage.com/2026EnergySummitExpo#/>.

June 23–24, 2026

Global Energy Forum 2026, New York City. For information, see <https://events.reutersevents.com/energy/global-energy-forum>.

June 25, 2026

Local Government Lab 2026: A Forum for New York State Researchers, Practitioners, and Policymakers. For information, see <https://rockinst.org/rig-events/local-government-lab/local-government-lab-2026/>.

September 20–27, 2026

Climate Week NYC, New York City. For information, see <https://www.climateweeknyc.org>.

September 27–28, 2026

NYSBA Environmental & Energy Law Section Fall Meeting, The Equinox, Manchester Village, Vermont. For information, see <https://nysba.org/committees/environmental-energy-law-section/>.

October 21–22, 2026

ACE NY (Alliance for Clean Energy New York) 2026 Fall Conference, Albany Capital Center, Albany. For information, see <https://www.aceny.org/fall-conference>.

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ENVIRONMENTAL LAW IN NEW YORK is published monthly by Matthew Bender & Co. Inc.

POSTMASTER: Send address changes to: LexisNexis, ATTN: Customer Support, 9443 Springboro Pike, Miamisburg, OH 45342.

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