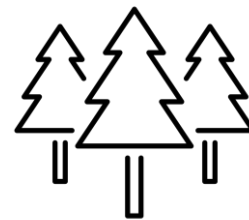




Department of
Environmental
Conservation

2025 STATE SUPERFUND REAUTHORIZATION AND PART 375 REGULATORY UPDATES

April 22, 2026



**A Summary of the 2025 SSF
Reauthorization and
Amendments to Article 27, Title
13 of the ECL**

Outline of Topics

- State Cause of Action for Cost Recovery – Definition of “Responsible Person”
- State Cause of Action for Natural Resources Damages
- Financial Responsibility Mechanisms.
- Environmental & Windfall Liens for Response Costs.
- Bona Fide Prospective Purchaser Defense
- Abatement Actions and Unilateral Administrative Orders (UAOs).
- Assessment, Classification, and Prioritization Reporting & Prioritization of significant threat sites.

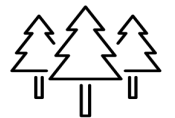


STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

State previously had to file claims in Federal Court based on CERCLA.

ECL 27-1327(1): The commissioner may request the attorney general commence an action in a court of competent jurisdiction to recover the response costs and/or natural resource damages.

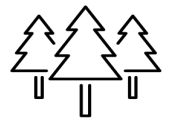
Each Responsible Person shall be strictly liable, jointly and severally, for all response costs and for all natural resource damages resulting from the disposal of hazardous waste at an inactive hazardous waste disposal site.



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

RESPONSIBLE PERSON DEFINITION – ECL 27-1301(11)

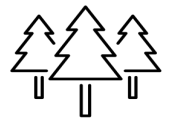
- Consistent with CERCLA with one major carve out for BCP Volunteers
 - Current owner/operator except for a volunteer that is participating under a brownfield cleanup agreement that is:
 - in full compliance with the requirements of this chapter with respect thereto, **and**
 - is not engaging with the department in bad faith with respect to any provisions of this title



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

RESPONSIBLE PERSON DEFINITION – ECL 27-1301(11)

- Therefore, Volunteers will not lose their exemption based on minor technical violations of the terms of a BCA.
- Implied covenant of good faith in all contracts.
- The “bad faith” requirement sets a high standard. Intentional conduct, not mere negligence.
- Consistent with NYSDEC Regulations at 6 NYCRR 375-3.5(c)(3) – NYSDEC may terminate BCA without 30-days notice if Applicant provides information or certifications that are materially inaccurate or incomplete.



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

RESPONSIBLE PERSON DEFINITION – ECL 27-1301(11)

- Examples of Bad Faith (Not All Inclusive)
 - Material misstatement of facts
 - Falsification of documents
 - Failing to disclose data
 - Undertaking unapproved field work that results in significant public health/environmental exposures



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

RESPONSIBLE PERSON DEFINITION – ECL 27-1301(11)

NYSDEC's preference is for parties to complete remediation under the BCP.

NYSDEC has no incentive to trigger SSF liability or disturb volunteer status for “minor violations,” which the NYSDEC would settle through issuance of a notice of violation.



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

Natural Resource Damages

- Liability scheme is the same as CERCLA 107
- NRD is compensatory not penal. Neither CERCLA nor SSF amendments contain any intent/wrongful conduct requirement for NRD claims.
- NRD relates to restoring natural resources that were injured by the contamination. The amount of NRD liability is based on the amount necessary to compensate for the injury through restoration/replacement/acquisition.



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

Natural Resource Damages

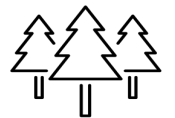
- NYSDEC's position is that nothing related to the current NRD program related to site selection, damage assessments, or EBPs will change under the SSF amendments.
- The State Cause of Action brings efficiency to NRD claims where the Federal Government is not a trustee (e.g., groundwater)



STATE CAUSE OF ACTION FOR COST RECOVERY AND NRD

Natural Resource Damages - Groundwater

- Groundwater is explicitly included in the CERCLA definition of natural resources (42 USC 9601(16)); thus, groundwater contamination already triggers NRD claims.
- NYSDEC is cognizant of the number of SSF sites with groundwater impacts, but not all groundwater impacts will result in NYSDEC NRD claims.



Financial Responsibility Mechanisms: ECL 27-1325(7)

Requires the Department to **Promulgate Regulations** re: financial responsibility requirements for parties undertaking a SSF site's remedial program.

Financial Responsibility Mechanisms may include insurance policies, a guarantee, surety bond, letter of credit, or qualification as a self-insurer (the Corporate Test).

Like RCRA Corrective Action, the purpose of the Financial Responsibility Mechanisms is to ensure that RPs demonstrate they have sufficient funds to pay for the cleanup of contamination at their sites. If an RP cannot afford to implement a remedial program, the RP has the option to enter a cash out settlement with the NYSDEC if the responsible party can demonstrate an inability to pay.

Although EPA generally does not utilize the Financial Responsibility section at CERCLA 108, EPA negotiates financial assurance requirements in its Superfund settlements and imposes financial requirements on PRPs through orders.

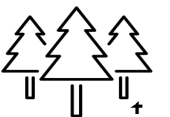
Financial Responsibility Mechanisms: ECL 27-1325(7)

Financial Assurance and Site Management

- Comments received during the legislative session included concerns regarding Financial Assurance for site management obligations, which potentially could run in perpetuity.
- Existing NYSDEC regulations include Financial Assurance provisions for the long-term implementation, maintenance, monitoring, and enforcement of institutional and engineering controls at 6 NYCRR 375-1.11(c).
- These regulations contain factors for the NYSDEC to consider on a case-by-case basis as to whether Financial Assurance will be required.

Environmental Liens ECL 27-1327(5)-(15)

- CERCLA 107(I) provides a Federal Lien in favor of the U.S. for all response costs and damages upon all real property that “belong” to an RP and are subject to or affected by a response action.
- Numerous other states have enacted laws authorizing the attachment of liens on the properties of parties responsible for paying environmental costs.
- Several of these states enacted Superliens, which take priority over other secured interests, including those interests which were perfected first.
- New York State legislature considered an environmental superlien bill in 1985, but it stalled in Committee.



Environmental Liens: Scope

- Monies that are Recoverable
 - All Response Costs incurred by the state for contamination at a site
 - All Natural Resources Damages where there is a judicial determination of liability
- Ownership requirements
 - Site must be owned by a responsible person
 - Site must have been used to dispose of hazardous waste

Environmental Liens: Enforcement and Release

- DEC may release liens via filing in the county where the environmental lien was filed, indexed accordingly
- Enforcement (also vacating and discharge) as provided in Article 3 of the lien law.
- DEC maintains the lien until the claim or judgment is satisfied or becomes unenforceable, it is released by the commissioner, is discharged by payment, vacated by court order, or not in the public interest as determined by the Commissioner
- Lien will be prioritized based on the date of filing – Not a Superlien
- Lien funds will go into the superfund if for response costs or the natural resource damages fund

Environmental Liens: Windfall Liens (27-1327(13))

- Modeled after CERCLA 107(r)
- If there are unrecovered response costs, the owner of the site is not liable due to BFPP status, and the conditions below are met, NYSDEC shall have a windfall lien on the site property or other property or by agreement other a lien on other property for assurance of payment of the unrecovered response costs.
 - DEC remediated hazardous waste at the site and has costs related to that response
 - The remediation of hazardous waste resulted in an increase in the fair market value of the site
 - Windfall lien amount is the lessor of the increase in market value from the remediation or the cost of the remediation

Bona Fide Prospective Purchaser: ECL 27-1323(5)

What is a BFPP? An owner or leaseholder (post 10/7/2003) who proves to the Department by a preponderance of the evidence:

1. Disposal of hazardous waste prior to acquisition
2. All Appropriate Inquiries
3. Provided all required notices re: discovery or disposal of hazardous waste
4. Exercised appropriate care re: hazardous waste by taking reasonable steps to stop disposal, prevent future disposal, prevent or limit exposure to previously disposed hazardous waste
5. Cooperates/assists/provides access for people authorized to respond to and/or restore the site
6. Compliant with land use restrictions re: responsible actions at site and does not impede effectiveness/integrity of institutional controls at site
7. Complies with request for info/subpoenas
8. Not potentially liable or affiliated with anyone potentially liable for response costs through
 - i. Direct or indirect familial relationship
 - ii. Contractual/corporate/financial relationship (other than via title/leasehold)
 - iii. Corporate reorganization of a potentially liable entity

Abatement Actions (and Unilateral Orders): ECL 27-1329

Authorizes NYSDEC to issue unilateral administrative orders (UAOs) for abatement actions when, after investigation, the Commissioner determines:

(1) that there is an imminent danger to public health or the environment, or

(2) that an actual or threatened release of hazardous waste from a Class 1 or Class 2 inactive hazardous waste disposal site is likely to result in irreversible or irreparable damage to natural resources.

Modeled after CERCLA 106 with additional pre-enforcement procedural considerations

- Ability to request a meeting with NYSDEC to reconsider
- Article 78 challenge to UAO issuance

Procedural Requirements for UAO Issuance: ECL 27-1329

Procedural Prerequisites:

Before issuing the UAO, the NYSDEC must determine that:

1. There is a reasonable belief that the person(s) to be ordered have adequate financial resources to comply with the UAO.
2. There is evidence sufficient to support the liability of the person(s) under ECL § 27-1313 or CERCLA.
3. The Department has made all reasonable efforts to obtain the voluntary agreement of the responsible person(s) to abate the danger or threat (i.e., a UAO will not be the first enforcement mechanism out of the box).
4. The person(s) are not exempt as bona fide prospective purchasers (BFPPs), as defined in ECL § 27-1323(5).

Reimbursement Provisions: ECL 27-1329

Any person who receives and complies with the terms of a UAO may, within 60 days after completion of the required response action, petition the commissioner for reimbursement from the hazardous waste remedial fund for the reasonable costs of such action, plus interest.

If the commissioner refuses to grant all, or part, of reimbursement to the petitioner, the petitioner may, within 30 days of receipt of such refusal, file an Article 78 action against DEC.

Petitioners shall establish by a preponderance of the evidence that such petitioner is not liable for response costs and that the costs associated with reimbursement are reasonable in light of the action required by the relevant order.

Petitioners (PRPs) may recover reasonable costs of response to the extent that such petitioner can demonstrate that the commissioner's decision in selecting response action ordered was arbitrary and capricious or was otherwise not in accordance with law.

Fines: ECL 27-1329

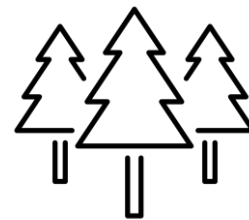
Fines

Pursuant to ECL § 27-1329(2)(a), any person who, without sufficient cause, fails or refuses to comply with any order of the commissioner may be fined not more than \$37,500 for each day in which such violation occurs or such failure to comply continues.

No punitive treble damages for NYSDEC's costs to implement response actions (EPA may recover under CERCLA 107(c)(3))

Disadvantaged Community Prioritization – Remediation and Cost Recovery

- Pursuant to ECL 27-1305(2)(b)(2), NYSDEC shall prioritize remedial programs at SSF sites located within a disadvantaged community.
- By January 1, 2026, NYSDEC shall submit to the governor and the legislature cleanup prioritization criteria, which must consider the level of threat posed by a site and whether the site is located within a disadvantaged community.
- Pursuant to ECL 27-1327(1), NYSDEC shall prioritize recovering response costs and natural resource damages at SSF sites located in disadvantaged communities.



A Summary of Relevant Amendments to the DEC's Part 375 Regulations for Remedial Programs

Purposes for DEC's Revisions to Part 375

- Incorporate changes, clarifications, and modifications to the regulations based on 2015 statutory changes to the BCP and the experiences developed during the first decade of implementing the BCP.
- Increase consistency across remedial programs (SSF, BCP, ERP) administered by DEC's Division of Environmental Remediation and provide DEC with the tools necessary to more effectively implement these programs.
- Update as needed based on 2022 Executive Budget Bill



Change of Use Definition and Requirements



- 375-1.2(e): Consistent definition across all remedial programs to reduce confusion due to multiple definitions.
- 375-1.11(d): Change of Use Notice shall:
 - Include Work Plan for Department approval; or
 - Identify approved Work Plan; or
 - Identify portion of approved Site Management Plan that covers change of use activity if prior to COC issuance.
 - Department may waive requirement for change of use that does not involve physical alteration of site (e.g. change of site ownership).
- After COC issuance, if activity is covered by Site Management Plan, then Site Management Plan notification is sufficient.

Proposed Part 375-1 Revisions

Termination of Orders/Agreements for Cause 375-1.5(b)(6)

- Explicitly provides the Department with the authority to terminate an Order or Agreement for cause where:
 - Remedial Party fails to “substantially comply” with Order or Agreement
 - For a Site that has been deemed a significant threat and provided that dispute resolution has not been commenced: Failure to initiate or complete remedial program in accordance with approved schedule
 - Remedial Party fails to pay State Costs



Proposed Part 375-1 Revisions

Part 375-1.6 Revisions - Work Plans and Reports

- Daily Reports
- During field activities, a Qualified Environmental Professional, “or their properly trained representative” shall be on site to supervise.
 - As part of supervisory responsibilities, daily reports submitted with:
 - Update of progress made
 - Locations of site activities
 - Quantities & descriptions of materials imported/exported
 - Summary of CAMP findings
 - Explanation of “notable site conditions
 - Deviations from approved work plan



Proposed Part 375-1 Revisions

Part 375-1.6(c)(4): Final Engineering Report: PE Certification

Certification by Professional Engineer that:

- PE is registered in NYS.
- PE is sole practitioner or is employed by an engineering firm with an appropriate Certificate of Authorization from NYS Dept. of Education.
- Certifying PEs must have
 - Directly supervised all engineering work, or
 - Completed engineering work required for remedial program in accordance with State Ed Law Section 145, or
 - Delegated or subcontracted engineering work to another qualified PE



Proposed Part 375-1 Revisions

Part 375-1.7(4): P Site Designations

- Preliminary information provides reason to believe that contaminants at the site may warrant the site's inclusion on the Registry of Inactive Hazardous Waste Disposal Sites.
- Site Characterization required to assess Significant Threat Determination.
- Regulations clarify the following requirements do not apply to P Sites:
 - Notice under 375-1.5(a);
 - Citizen Participation under 375-1.10; and
 - Change of Use under 375-1.11(d)



Part 375-1.8: REMEDIAL PROGRAM REQUIREMENTS

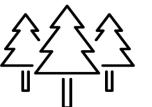
- Habitat Reconstruction – Goals of remedial program now include restoration of habitat disturbed by remedial program.
Reconstruction Plan in lieu of permit at new Part 375-1.12(f)
- Plume Containment/Stabilization – Volunteer must address to the extent feasible, on-site plume and prevent migration of site-related plume off-site. Consistent with EC 27-1415(5-a).



Proposed Part 375-3 Brownfield Cleanup Program Revisions

PRP Search (Part 375-3.2(k); 375-3.3(b); and 375-3.4(b)(1))

- Volunteers seeking entry of a Class “2” SSF site or a RCRA TSDF having interim status in the BCP are required to identify PRPs who may be legally liable for contamination.
- The Department will use the PRP Search, along with other available information, to determine whether a PRP for that property is able to pay for the remedial program.



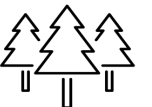
Cover System or Site Cover (Part 375-3.2(e))

- Clean soil cover of one or two feet in thickness based on intended use with a clear demarcation layer where possible and appropriate.
- Hardscape cover systems including the following components - pavement, concrete, paved surface parking areas, sidewalks, building foundations, and building slabs.
- Required thicknesses of Cover System
 - Environmentally Important Areas (375-6.6) – Adequate to support ecological resources as determined by DEC (min. 2 feet).
 - Commercial or Industrial – 1 foot
 - Restricted Residential – 2 feet



SITE ELIGIBILITY – Part 375-3.3

- **Revising the description of Eligible Sites to harmonize with changes to the statute**
- **Site must “require remediation” for the “reasonably anticipated end use.”**
DEC may consider following criteria:
 - How many samples exceed applicable SCGs
 - Magnitude above applicable SCGs
 - Magnitude above site specific background concentrations
 - Potential for human or ecological exposure to contaminants
 - Potential for a contaminant to migrate



SITE ELIGIBILITY – Part 375-3.3

- **Reasonably Anticipated Use Criteria**
 - Current use and historical/recent development patterns
 - Applicable zoning laws and maps
 - Land use plans formally adopted by a municipality
 - Approved redevelopment plans
 - Natural resources (wetlands, waterways, critical habitats)



Proposed Part 375-3 Brownfield Cleanup Program Revisions

Remedial Program – Part 375-3.8

Off-Site Contamination - Volunteers

- Consistent with ECL 27-1415(2)(b), Part 375-3.8(b)(2)(i) clarifies that a volunteer may be required to complete off-site investigation to support the qualitative exposure assessment:
 - SVI evaluation and sampling at nearby structures;
 - Off-site groundwater sampling if potential exposure pathway exists
 - Off-site soil sampling if potential exposure pathway exists



Proposed Part 375-3 Brownfield Cleanup Program Revisions

Remedial Program – Part 375-3.8

Remedy Selection for Class 2 Registry Sites in BCP

- If a Record of Decision has been issued, Applicant will implement the on-site elements of the remedy.
- If a remedy is to be developed, a Feasibility Study will be required in place of an Alternatives Analysis. DEC will select a remedy in accordance with SSF process at 375-2.8(e).



Proposed Part 375-3 Brownfield Cleanup Program Revisions

Remedial Program – Part 375-3.8

Conditional Track 2 – Part 375-3.8(e)(1)(iii)

- Previously, Volunteers could obtain a Track 1 COC through implementation of short-term (less than 5 years) Institutional Controls(IC)/ Engineering Controls (ECs) for soil vapor and/or groundwater. If RAOs not met in 5 years, COC reverted to Track 2.
- In future, Volunteers using ICs/ECs to address soil vapor and/or groundwater concerns would initially receive a Track 2 COC. If during the proceeding 5 years soil vapor and/or groundwater RAOs are achieved, then a Track 1 COC would be issued.



Proposed Part 375-3 Brownfield Cleanup Program Revisions

Remedial Program – Part 375-3.8

Track 2 Soil Component – Part 375-3.8(e)(2)

- Currently, soils in upper 15 feet or top of bedrock, whichever is shallower, must meet applicable SCOs.
- However, soils below 15 feet must not represent a source of contamination.
 - At DEC's discretion, soils below 15 may exceed GW protection SCOs if contamination is being addressed by on-going GW remedy.



Proposed Part 375-3 Brownfield Cleanup Program Revisions

Remedial Program – Part 375-3.8

Track 2 Soil Component – Part 375-3.8(e)(2)

- DEC's Use of Discretion May Consider:
 - Degree contamination exceeds GW protection SCO;
 - Aerial extent of contamination exceeding GW protection SCOs;
 - Practicability of addressing contamination; and
 - Degree contamination has migrated or has potential to migrate from the site.





**Department of
Environmental
Conservation**