

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION 3RD DEPARTMENT**

JULIAN MARCUS RAVEN,
Appellant,

v.

**NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
NY Governor KATHY HOCHUL,
DEC Commissioner AMANDA LEFTON,
Project Attorney DUDLEY LOEW,
Project Manager KIRA BRUNO.**

Appellees.

Appeal case number #CV-26-0480

From Chemung County Supreme Court - Hon. Judge
Baker **Index No.: 2025-1215**

BRIEF FOR APPELLANT

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Appellant, Pro Se.

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CPLR 5531 STATEMENT

Pursuant to **CPLR §5531**, the following information is submitted:

1. Court of original instance:

Supreme Court of the State of New York, Chemung County

2. Name of the judge who issued the order appealed from:

Hon. Christopher P. Baker

3. Nature of the action:

CPLR Article 78 proceeding challenging administrative action of the New York State Department of Environmental Conservation regarding classification of property on the Registry of Inactive Hazardous Waste Disposal Sites.

4. Nature of the order appealed from:

Decision and Order dismissing the Petition.

5. Date of the order appealed from:

February 6, 2026

6. Whether the appeal is from a final or interlocutory order:

Final order.

7. Whether there was a jury trial:

No.

8. If the appeal is from a judgment or order entered after a trial, state whether the appeal concerns:

Not applicable.

9. The date the Notice of Appeal was filed:

March 2, 2026

10. The method of appeal:

Appeal taken pursuant to CPLR Article 78 and CPLR 5701.

Dated: March 15, 2026

Elmira, New York

A handwritten signature in blue ink, appearing to read "Julian Marcus Raven". The signature is stylized with large, sweeping loops and a long horizontal stroke at the bottom.

Julian Marcus Raven
Petitioner–Appellant, Pro Se

NOTE: References to appendix appear as (A-pagelumber-pagelumber)
References to Addendum (Add-pagelumber)

STANDARD OF REVIEW

This appeal arises from the dismissal of an Article 78 petition (A-142-344) on legal grounds. Where a lower court resolves an Article 78 proceeding based on questions of law—such as statutory interpretation, jurisdiction, or the applicability of the statute of limitations—the Appellate Division reviews those determinations **de novo**.

Questions of statutory interpretation and legal authority are reviewed independently by the appellate court without deference to the legal conclusions of the trial court. See:

Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009) (courts reviewing administrative determinations must determine whether the agency’s action was affected by an error of law);

Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 107 (1997) (questions of statutory interpretation present issues of law subject to independent judicial review);

Toys “R” Us v. Silva, 89 N.Y.2d 411, 418 (1996) (statutory interpretation is a question of law for the courts).

Accordingly, where the issue on appeal concerns whether an agency acted within the scope of its statutory authority, the reviewing court owes no deference to the lower court's legal conclusions.

In an Article 78 proceeding, courts must determine whether the agency's determination:

“Whether the body...proceeded, is proceeding or is about to proceed without or in excess of jurisdiction...was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion.”

CPLR §7803(1-3).

The Court of Appeals has explained that an administrative determination is arbitrary and capricious when it lacks a rational basis in the record or when the agency fails to follow the governing statutory and regulatory framework. ***Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974).***

Furthermore, where an agency acts beyond the authority granted to it by statute, the resulting action is ultra vires and subject to judicial review. See:

New York State Assn. of Counties v. Axelrod, 78 N.Y.2d 158, 166 (1991);

Parkview Assoc. v. City of New York, 71 N.Y.2d 274, 282 (1988).

Because the Supreme Court dismissed the Petition based on legal conclusions regarding the finality of the DEC's actions and the applicability of the statute of limitations, the issues presented on this appeal are questions of law.

The Appellate Division therefore reviews the decision **de novo**, independently determining whether the DEC's actions complied with the statutory framework governing hazardous waste site classification under **ECL §27-1305** and the implementing regulations contained in **6 NYCRR Part 375**.

Where, as here, the lower court failed to apply the governing statutory and regulatory standards and instead deferred to the agency's litigation assertions, reversal is required.

INTRODUCTION

This appeal arises from the dismissal of a CPLR Article 78 proceeding challenging the New York State Department of Environmental Conservation's ("DEC") designation of Appellant's property at 714 Baldwin Street, Elmira, New York as a "Class 2 - Significant Threat" site on the Registry of Inactive Hazardous Waste Disposal Sites. Appellant is an artist who has used the building extensively for over a decade as his art studio, even residing in the building with his family for extended periods with *no adverse health effects*.(A-205-211)

The Supreme Court dismissed the Petition without addressing whether the DEC's classification satisfied the statutory and regulatory requirements governing a "significant threat" determination under the Environmental Conservation Law. Instead, the court accepted the DEC's litigation assertion that the site had been classified as a Class 2 property in March 2009 and concluded that the Petition was therefore time-barred. (A-1015-1021)

That conclusion rests on a fundamental analytical error. Rather than examining whether the DEC complied with the governing statutory framework—including ECL §§27-1305 and 27-1313 and the regulatory criteria set forth in 6 NYCRR §375-2.7—the court treated the site's presence on the Registry as conclusive proof that a lawful classification determination had occurred. (A-1019-1020)

Article 78 review requires courts to determine whether an agency acted in accordance with law, upon a proper record, and without arbitrary or capricious action. Here, the court did not examine whether the statutory prerequisites for a Class 2 “significant threat” determination were satisfied, nor whether the DEC’s classification complied with the regulatory criteria governing such determinations. Instead, the decision relied almost entirely on litigation affidavits submitted by the agency, including an affidavit from unqualified DEC trainee Kira Bruno (Add. Pg 85) asserting that the classification occurred in March 2009. (A-1019)

Classification of a site as a Class 2 “significant threat” property carries substantial legal consequences, including the authority to conduct invasive investigations and compel remedial action under ECL §27-1313(3)(a). Because those powers derive solely from statute, courts reviewing agency action must determine whether the statutory conditions authorizing such authority were lawfully satisfied. *The Supreme Court did not undertake that analysis.*

Most notably, the court never examined the regulatory criteria defining a “significant threat” under 6 NYCRR §375-2.7, despite the Petition’s explicit challenge (A-151-165) to the DEC’s failure to demonstrate conditions constituting a threat to public health or the environment. (A 1015.)

The issues presented on appeal are therefore straightforward:

- 1. Whether** the Supreme Court failed to determine whether the DEC complied with the statutory requirements governing classification of a site as a “significant threat” under the Environmental Conservation Law.
- 2. Whether** the court improperly treated the site’s presence on the Registry as conclusive proof of a lawful classification determination without examining the statutory and regulatory criteria required by law.
- 3. Whether** the court misapplied the statute of limitations by assuming a lawful and final classification occurred in 2009 that binds a subsequent property owner.
- 4. Whether** the court improperly relied on litigation affidavits rather than the administrative record and governing statutory framework.
- 5. Whether** the court failed to analyze the regulatory definition of a “significant threat” under 6 NYCRR §375-2.7, the central issue raised by the Petition.

Because the Supreme Court did not undertake the statutory and regulatory analysis required to review the DEC’s determination, the dismissal of the Petition cannot stand. The decision should therefore be reversed so that the legality of the DEC’s classification may be evaluated under the governing statutory framework.

POINT I — Page 8 Jurisdictional dismissal was improper where respondents had actual notice

POINT II — Page 15 The court failed to review DEC compliance

POINT III — Page 19 Registry listing was improperly treated as proof

POINT IV — Page 24 Statute of limitations cannot run from an unlawful classification

POINT V — Page 32 The alleged 2009 designation was not binding on appellant

POINT VI — Page 39 The court relied on litigation affidavits

POINT VII — Page 43 The court failed to apply the regulatory definition

POINT VIII — Page 48 Investigations showed no source and no completed threat determination

POINT IX — Page 56 Registry listing is informational, not a final administrative determination

POINT X — Page 64 Registry publication cannot trigger Article 78 limitations.

POINT XI — Page 72 Exhaustion is not required where agency action is ultra vires or futile

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The verified Petition was also filed on **NYSCEF(A-151-185)** prior to the **January 6, 2026 Order to Show Cause hearing**, providing formal electronic notice and service through the Unified Court System. Respondents therefore had actual notice of the claims and a full opportunity to respond.

This case does not involve lack of notice. Rather, dismissal rests solely upon the **postal classification of the envelope used for mailing the Petition**, a purely technical issue unrelated to prejudice or due process.

C. The Alleged Service Defect Was Technical and Curable Under CPLR 2001

The Supreme Court concluded that service was defective because the mailing was sent by **USPS Media Mail rather than certified mail**, and because the envelope allegedly lacked the legend **“URGENT LEGAL MAIL.”** (A-1009-1010)

CPLR §2001 expressly authorizes courts to disregard such non-prejudicial defects:

“At any stage of an action... the court may permit a mistake, omission, defect or irregularity... to be corrected... or shall disregard it if a substantial right of a party is not prejudiced.”

New York courts repeatedly hold that dismissal is inappropriate where defendants receive actual notice and suffer no prejudice. See *Leader v. Maroney, Ponzini &*

Spencer, 97 N.Y.2d 95, 104 (2001); Ruffin v. Lion Corp., 15 N.Y.3d 578, 582 (2010). The purpose of service statutes is to ensure notice and fairness, not to create procedural traps where notice has already been achieved.

D. The Court Acknowledged the Service Issue Yet Proceeded With the Hearing

The record further demonstrates that the Supreme Court was aware of the alleged service defect yet chose to proceed with the litigation.

During the **November 14, 2025 Temporary Restraining Order hearing**, respondents argued that personal jurisdiction was lacking due to alleged defects in service under CPLR 307. In response, the Court acknowledged the issue but stated on the record that it would proceed despite the alleged defect, explaining that appellant was appearing pro se and that respondents had already appeared and submitted papers. The Court stated:

“Let's just assume for a matter that I afford Mr. Raven as a pro se litigant extra benefits... you're here today... you've submitted opposing papers, and **I overlooked those defects under the CPLR.**”

(TRO Transcript, Nov. 14, 2025, at 15). (A-575(Lines 3-8))

Thus, the Court expressly recognized the alleged defect yet permitted the proceeding to continue and entertained respondents' arguments.

E. The Court Allowed the Matter to Proceed Without Requesting Cure

After the November 14 hearing, the matter remained pending and the Court scheduled the **January 6, 2026 Order to Show Cause hearing**. During that period respondents continued to litigate the case and appellant filed additional papers. At no point did the Court direct appellant to re-serve the Petition or otherwise cure any alleged defect.

Even when the issue was raised again during the January 6 hearing, the Court allowed the proceeding to continue and addressed the parties' arguments without directing corrective service. Only after full participation by respondents did the Court dismiss the Petition on jurisdictional grounds.

Such sequencing conflicts with the discretionary authority granted by **CPLR 2001** to permit correction of non-prejudicial procedural irregularities.

H. The Court's Strict Treatment of Service Contrasts With Its Failure to Examine Statutory Notice Requirements Governing the Agency's Actions

The jurisdictional dismissal below also exposes a broader analytical inconsistency.

While the Supreme Court applied the Civil Practice Law and Rules with strict

technicality to a mailing defect that caused no prejudice, the court declined to examine whether the Department of Environmental Conservation complied with the statutory notice requirements governing the administrative action being challenged contained also in two orders to Appellant in consent in 2017 & 2025. (A-1058 (lines 9-15))

Under **ECL §27-1313(4)**, property owners must receive written notice and an opportunity to contest a hazardous waste site determination before enforcement authority may be exercised. Likewise, the regulatory framework governing hazardous waste site classification requires specific findings demonstrating a significant threat. 6 NYCRR §375-2.7.

Appellant's petition alleged that those statutory procedures were never followed and that no notice or opportunity to contest the alleged determination was ever served upon him. Yet the Supreme Court declined to examine whether those statutory prerequisites were satisfied and instead accepted the agency's litigation assertions that a classification had occurred years earlier.

The contrast is striking. The court dismissed a citizen's Article 78 petition over a technical mailing issue despite actual notice and full participation by respondents, yet declined to examine whether the agency itself complied with the statutory procedures that condition its authority to regulate private property. Such asymmetrical treatment of procedural obligations conflicts with the mandate of

CPLR §7803, which requires courts reviewing administrative action to determine whether agency conduct was made in violation of jurisdiction, lawful procedure, affected by an error of law, or arbitrary and capricious.

Conclusion of Point I

Because respondents received actual notice, appeared and litigated the proceeding, suffered no prejudice, and the Supreme Court acknowledged and overlooked the alleged defect during the TRO hearing while never permitting appellant an opportunity to cure it, the dismissal for lack of personal jurisdiction constituted an abuse of discretion and should be reversed.

POINT II

THE SUPREME COURT FAILED TO REVIEW WHETHER THE DEC COMPLIED WITH THE STATUTORY REQUIREMENTS GOVERNING CLASSIFICATION OF A “SIGNIFICANT THREAT” SITE

The Supreme Court dismissed the Petition without conducting the statutory review required under Article 78 and the Environmental Conservation Law governing classification of a site as a “Class 2” significant threat property.

The Petition challenged the DEC's classification determination on the ground that the agency failed to satisfy the regulatory criteria defining a "significant threat" under 6 NYCRR §375-2.7. The court acknowledged this claim, summarizing that Petitioner argued the DEC's determination violated the regulation because it failed to connect the presence of contaminants to "current or reasonably foreseeable harm." (A-1007) The court further recognized that under the regulation "the mere presence of contaminants at a site is not a sufficient basis to find that the contaminants constitute a significant threat." (A-1007)

Despite identifying this central regulatory issue, the court never analyzed the elements of the regulation or determined whether the DEC's classification satisfied those criteria.

Instead, the decision rests entirely on the court's acceptance of the DEC's assertion that the property had previously been classified as a Class 2 site in 2009. The court relied on an affidavit submitted by a DEC employee asserting that the property was first classified as Class 2 in March 2009 and accepted that statement as dispositive proof that a valid classification determination had occurred. (A-1010-1011) Based on that assertion alone, the court concluded that the agency action became "final and binding" in 2009 and that the statute of limitations expired four months later. (A-1010-1011)

This reasoning bypasses the statutory inquiry required by Article 27 of the Environmental Conservation Law.

Under ECL §27-1305, the DEC may list sites on the Registry and classify them into categories reflecting their threat to public health or the environment. A Class 2 designation is reserved for sites that constitute a “significant threat to the public health or environment,” a determination that carries substantial legal consequences, including the DEC’s authority to conduct intrusive investigations and compel remedial action pursuant to ECL §27-1313(3)(a). (A-1011)

Because these powers derive exclusively from statute, courts reviewing such determinations must examine whether the agency complied with the statutory and regulatory requirements governing classification.

The Supreme Court did not perform that analysis.

The decision does not examine whether the DEC satisfied the criteria for determining a “significant threat” under 6 NYCRR §375-2.7. Nor does the decision analyze the evidentiary basis for the classification or determine whether the DEC established the existence of conditions constituting a significant threat to public health or the environment.

Instead, the court treated the DEC's statement that a classification occurred in 2009 as legally determinative contradicting the DEC's own 2008 MACTEC report . (A-1010) In doing so, the court effectively treated the existence of a Registry entry as conclusive proof that the statutory requirements for classification had been satisfied.

That assumption is legally insufficient.

Article 78 review requires courts to determine whether an agency acted in accordance with law and whether its determination is supported by the administrative record. Here, however, the court did not examine the scientific or regulatory basis for the classification. Rather, it accepted the agency's litigation position as proof that the classification was valid and final.

The decision also fails to address whether the statutory procedures governing orders and enforcement under ECL §27-1313 were satisfied, including the relationship between the classification determination and the subsequent exercise of DEC authority over the property. Instead, the court cited ECL §27-1313 only to describe the powers that arise from a Class 2 designation, noting that such classification allows the DEC to conduct invasive investigations and require remedial programs. (A-1011) The court never determined whether those statutory conditions had been lawfully satisfied in the first instance.

Thus, the court’s analysis collapses the statutory inquiry into a single untested premise: that the DEC’s assertion that the site was classified in 2009 must be accepted as conclusive proof that the classification was lawful.

That is not the standard of judicial review required under Article 78.

Because the Supreme Court failed to examine whether the DEC complied with the governing statutory and regulatory framework—particularly the criteria defining a “significant threat” under 6 NYCRR §375-2.7—the dismissal of the Petition cannot stand. The decision should therefore be reversed so that the legality of the DEC’s classification determination may be evaluated under the controlling provisions of the Environmental Conservation Law.

POINT III

THE SUPREME COURT IMPROPERLY TREATED THE SITE’S PRESENCE ON THE REGISTRY AS CONCLUSIVE PROOF OF A LAWFUL CLASSIFICATION DETERMINATION

The Supreme Court’s decision rests on a critical legal error: the court treated the site’s presence on the Registry of Inactive Hazardous Waste Disposal Sites as conclusive proof that a lawful Class 2 classification determination occurred in

2009. The Environmental Conservation Law does not authorize such a presumption.

The decision states that “the DEC’s listing of Petitioner’s property on the Registry, and its classification of the site as a Class 2 site, were final and binding upon the Petitioner (or more accurately, his predecessor in interest), in or about March of 2009.” (A-1011) The court further concluded that “[i]t was then that the DEC added Petitioner's property to the Registry and classified it as Class 2,” and therefore the statute of limitations began to run at that time. (A-1011)

That reasoning improperly conflates two distinct legal concepts:

- (1) the administrative act of listing a site on the Registry; and
- (2) the statutory determination that a site constitutes a “significant threat to public health or the environment.”

Under ECL §27-1305, the DEC is required to maintain a registry of inactive hazardous waste disposal sites and classify those sites according to the level of threat they pose. However, the statute does not provide that the mere appearance of a site on the Registry constitutes proof that the statutory conditions for classification have been satisfied. Rather, the statute establishes a framework

requiring the agency to determine whether a site meets the criteria for the applicable classification category.

For a site to be designated as a Class 2 site, the agency must determine that the site “constitutes a significant threat to the public health or environment” and that “action is required.” ECL §27-1305(2)(b)(2). That determination is governed by the regulatory criteria set forth in 6 NYCRR §375-2.7, which define the circumstances under which a site may be considered a “significant threat.”

The Supreme Court did not examine whether those statutory and regulatory criteria were satisfied.

Instead, the court relied entirely on an affidavit submitted by a DEC employee asserting that the site was classified in 2009 and on documentary materials attached to that affidavit. (A-1010) Based on those materials alone, the court concluded that the classification was final and binding in 2009 and that the statute of limitations therefore expired four months later. (A-1010-1011)

Article 78 review requires more.

Courts reviewing administrative action must determine whether the agency acted in accordance with law and whether its determination has a rational basis in the

record. See CPLR 7803(3). Administrative determinations must be annulled where they are “made in violation of lawful procedure, affected by an error of law, or arbitrary and capricious.” CPLR 7803(3).

New York courts have repeatedly held that judicial review of administrative action requires examination of the agency’s actual determination and the record supporting it. See *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974) (courts must determine whether administrative determinations have a rational basis and are supported by the record); *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009) (agency action must be annulled where it lacks a rational basis or is affected by an error of law).

The Supreme Court did not undertake that review!

Rather than determining whether the DEC made a lawful “significant threat” determination consistent with ECL §27-1305 and 6 NYCRR §375-2.7, the court treated the agency’s assertion that the site was listed on the Registry as proof that the classification determination had already been lawfully made. (A-1010-1011)

The court therefore bypassed the very inquiry required under Article 78.

The decision contains no analysis of whether the statutory criteria for a Class 2 designation were satisfied, no examination of the scientific basis for the classification, and no review of the administrative record underlying the alleged 2009 determination. Instead, the court simply accepted the agency's litigation position and treated it as legally dispositive.

That approach effectively insulates the DEC's classification from judicial review.

The Environmental Conservation Law does not permit such deference.

Classification of a site as a Class 2 "significant threat" site carries significant legal consequences, including the DEC's authority to conduct intrusive investigations and compel remedial actions pursuant to ECL §27-1313(3)(a). (A-1011) Because those powers arise only after a lawful classification determination, courts reviewing such determinations must examine whether the statutory requirements for classification were actually satisfied.

The Supreme Court's decision contains no such analysis.

By treating the site's appearance on the Registry as conclusive proof that a lawful classification determination occurred, the court effectively substituted administrative assertion for statutory compliance. This was legal error.

Because the court failed to determine whether the DEC complied with the statutory and regulatory requirements governing classification of a “significant threat” site, the dismissal of the Petition cannot stand. The decision should therefore be reversed and the matter remitted for judicial review of the DEC’s classification under the governing provisions of the Environmental Conservation Law and its implementing regulations.

POINT IV

THE SUPREME COURT ERRED IN HOLDING THAT PETITIONER’S CLAIMS ARE TIME-BARRED BECAUSE THE ALLEGED 2009 CLASSIFICATION WAS NEVER LAWFULLY ESTABLISHED

The Supreme Court dismissed the Petition on the ground that the DEC’s alleged classification of the property as a Class 2 inactive hazardous waste disposal site in 2009 constituted a “final and binding”(A-1010) determination that triggered the four-month statute of limitations under CPLR § 217(1). That conclusion rests on a critical legal assumption: that a lawful classification occurred in 2009.

The record relied upon by the Department and the court below does not establish that the statutory prerequisites for such a classification were ever satisfied.

Because the statutory predicate for classification was never established, the alleged 2009 determination was ultra vires and void. A void administrative act cannot become final through the passage of time and cannot trigger the statute of limitations.

A. The Court Assumed Lawful Classification Without Examining the Statutory Predicate Required by ECL § 27-1313

Justice Baker's decision states that the DEC's listing of the property on the Registry and its classification of the site as a Class 2 inactive hazardous waste disposal site were "final and binding" upon Petitioner's predecessor in interest in March 2009.

That conclusion presumes that a lawful classification occurred.

But the Environmental Conservation Law permits classification of an inactive hazardous waste disposal site only where the statutory predicate has been established. ECL § 27-1313(3)(a) authorizes enforcement only when hazardous waste disposed at the site constitutes a significant threat to public health or the environment.

Thus, the statute requires proof of:

1. Disposal at the site, and

2. Conditions constituting a significant threat.

The investigative record relied upon by the Department fails to establish these elements.

The Department's own contractor reported that the source area had not been identified(A-321-322, A-254) and that it was not known whether the site was the source of the contamination. Additional investigation was recommended in order to determine the possible origin of the detected contamination.

Where the statutory condition precedent for classification has not been satisfied, the agency lacks authority to impose that classification.

An administrative determination issued without statutory authority is ultra vires and void.

See *Campagna v. Shaffer*, 73 N.Y.2d 237, 242 (1989); *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 518 (1976).

B. A Void or Ultra Vires Administrative Act Cannot Become Final Through the Passage of Time

The statute of limitations under CPLR § 217 applies only to review of a lawful administrative determination.

Where an agency acts wholly beyond its statutory authority, courts have consistently recognized that the doctrines of exhaustion and timeliness do not bar review.

See *Town of Bellmont v. New York State Department of Environmental Conservation*, 284 A.D.2d 761, 763 (3d Dept. 2001).

If the agency lacked authority to issue the classification in the first instance, the act is void ab initio.

A void act cannot become valid through the passage of time, nor can it acquire immunity from judicial review simply because years have passed since its issuance.

The Supreme Court's statute-of-limitations analysis assumes that the DEC possessed lawful authority to classify the site in 2009. But that threshold question was never examined.

Authority must precede finality.

C. The Court Misapplied the “Final and Binding” Accrual Standard

The decision relies on cases such as *Riverkeeper, Inc. v. Crotty*, 28 A.D.3d 957 (3d Dept. 2006), and *Matter of Best Payphones, Inc. v. Department of Information*

Technology & Telecommunications, 5 N.Y.3d 30 (2005), to support the conclusion that the statute of limitations accrued in 2009.

Those cases establish that an administrative determination becomes final and binding when:

1. The agency has reached a definitive position, and
2. The injury inflicted by that position cannot be prevented or ameliorated through further administrative action.

Best Payphones, 5 N.Y.3d at 34.

The record here demonstrates that the agency had not reached a definitive position in 2009.

Years after the alleged classification, the Department's investigative record still acknowledged that the source area had not been identified and that plume boundaries had not been established, and further investigation was required in order to determine whether the property itself was the source of contamination.

Where an agency continues to investigate the fundamental factual predicate for regulatory action, the agency has not yet reached a final and binding determination.

A premature or unsupported classification cannot be insulated from review through application of limitations doctrine.

D. The Court Improperly Conflated Registry Listing With Lawful Classification

The Decision further states that the DEC's addition of the property to the Registry and its designation of the site as Class 2 constituted the agency's "definitive position" on the matter.

But the act of listing a site on the Registry does not itself establish that the statutory requirements for classification were satisfied.

ECL § 27-1305 directs the Department to maintain a registry and to classify sites appearing on it, but that administrative labeling cannot substitute for the statutory findings required by ECL § 27-1313.

The statute conditions classification on a determination that hazardous waste disposed at the site constitutes a significant threat.

By treating the act of registry listing as proof that those statutory requirements had been met, the court effectively presumed the validity of the classification without examining whether the statutory predicate existed.

Administrative labeling cannot substitute for statutory compliance.

E. The Record Contradictions Demonstrate That No Completed Determination Existed in 2009

The investigative record before the Department contains internal inconsistencies that further undermine the premise that a final determination existed in 2009.

The Department relied on the 2009 listing and classification notice to a prior owner as evidence of a completed determination.

Yet the Department's own investigative reports admitted that:

- the source area had not been identified,
- it was not known whether the site was the source of contamination,
- the boundaries of groundwater contamination had not been established, and
- additional investigation was required to determine the origin of contamination.

An administrative determination is arbitrary and capricious when it lacks a sound basis in the record.

Charles A. Field Delivery Serv., Inc. v. Roberts, 66 N.Y.2d 516, 519 (1985); *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974).

The court's statute-of-limitations analysis never reconciled these contradictions in the agency's own investigative record.

F. Because the Statutory Predicate Was Never Established, the Limitations Period Never Accrued

The Supreme Court's dismissal rests entirely on the premise that a lawful, final classification occurred in March 2009.

But the Department's own investigative record establishes that:

- the source area had not been identified,
- the plume boundaries had not been determined, and
- additional investigation was required to determine whether contamination originated at the site.

Where the statutory predicate for classification was never established, the agency lacked authority to issue the classification in the first instance.

An ultra vires administrative act is void ab initio. A void act cannot become final through the passage of time and cannot trigger the statute of limitations under CPLR § 217.

To the extent the Supreme Court also concluded that this proceeding was premature because petitioner failed to exhaust administrative remedies, that conclusion similarly rests on the erroneous premise that a lawful classification already existed. The independent reasons why the exhaustion doctrine does not apply here are summarized below in (Add. Page 86)

Accordingly, the Supreme Court erred as a matter of law in dismissing the Petition as time-barred.

POINT V: THE SUPREME COURT ERRED IN HOLDING THAT THE 2009 CLASS 2 DESIGNATION WAS “FINAL AND BINDING” UPON APPELLANT OR HIS PREDECESSOR IN INTEREST

The Supreme Court concluded that the DEC’s addition of the property to the Registry and its classification of the site as Class 2 in March 2009 were “final and binding upon the Petitioner (or more accurately, his predecessor in interest).” (A-1010)

Predecessor Argument Error

That conclusion is contrary to the statutory enforcement structure established by the Environmental Conservation Law.

Under ECL § 27-1313, enforcement consequences for a significant threat determination arise only through the issuance of a lawful order directed to a specific person. The statute does not authorize a registry listing alone to impose binding enforcement consequences upon later purchasers of property who were not the subject of such an order.

Because Appellant did not acquire the property until 2014 and there is no record evidence that any lawful enforcement order under ECL § 27-1313(4) was issued to him, the Supreme Court erred as a matter of law in concluding that a 2009 classification was final and binding upon him.

A. ECL § 27-1313(4) Attaches Enforcement Consequences Only to the Subject of a Lawfully Issued Order

The statutory enforcement mechanism for inactive hazardous waste disposal sites is set forth in ECL § 27-1313(4). That provision authorizes the Department to issue an order directing the owner or operator of a site to develop and implement a remedial program where the Department determines that hazardous waste disposed at the site constitutes a significant threat to public health or the environment.

The statute contemplates issuance of an order directed to **“such person”** who is the subject of that determination.

Thus the enforcement mechanism operates through a specific procedural sequence:

1. The Department makes a determination that a site constitutes a significant threat.
2. The Department issues a lawful order under ECL § 27-1313(4).
3. That order is directed to a particular owner or responsible party.
4. Enforcement consequences attach to the subject of that order.

Registry listing alone does not constitute this enforcement mechanism.

The Supreme Court’s reasoning effectively converts registry listing into a self-executing determination binding on future owners, even in the absence of a lawful

enforcement order directed to them. Nothing in the Environmental Conservation Law authorizes such a result.

B. The Record Contains No Evidence of a Lawfully Issued § 27-1313(4) Order

The record contains no evidence that a lawful order under ECL § 27-1313(4) was ever issued to Appellant.

Nor does the record contain evidence that such an order was issued to Appellant's alleged predecessor in interest.

The Decision relies upon the existence of a 2009 registry listing and classification notice, but it does not identify any administrative order issued pursuant to § 27-1313(4), nor does it identify any record evidence demonstrating that such an order was lawfully executed and served.

An administrative determination must be supported by evidence in the record.

Where an agency determination lacks a factual foundation in the record, it is arbitrary and capricious.

Charles A. Field Delivery Serv., Inc. v. Roberts, 66 N.Y.2d 516, 519 (1985);

Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974).

Because the record contains no evidence of a lawfully issued enforcement order under § 27-1313(4), the statutory predicate for imposing enforcement consequences upon either the predecessor or Appellant was never established.

C. A Determination Cannot Be “Final and Binding” Upon a Person Who Was Not the Subject of the Agency Action

Under New York law, an administrative determination becomes final and binding only when the agency has reached a definitive position that inflicts concrete injury upon the party seeking review.

Best Payphones, Inc. v. Department of Information Technology & Telecommunications, 5 N.Y.3d 30, 34 (2005).

The Supreme Court relied upon this principle in concluding that the statute of limitations began to run in 2009.

But a determination cannot be final and binding upon a person who:

- was not the owner of the property at the time,
- was not the subject of the agency action,
- did not receive notice of the determination, and
- had no opportunity to challenge it.

- Appellant did not acquire the property until 2014. During the subsequent 12 years of ownership, Appellant was never given notice via certified USPS mail and or an opportunity for a hearing to contest the DEC's alleged classification determinations as the subject of DEC orders on consent according to ECL 27-1313-4.

It is therefore legally impossible for a 2009 determination to have been “final and binding” upon him at that time or any time since.

D. The Environmental Conservation Law Does Not Authorize Automatic Successor Liability for Prior Administrative Classifications

The Supreme Court’s reasoning effectively imposes enforcement consequences upon Appellant solely because he later acquired title to property that had previously appeared on the Registry.

But the Environmental Conservation Law does not authorize automatic successor liability for administrative classifications absent lawful procedure directed to the subsequent owner.

Administrative liability cannot attach through mere inheritance of title without compliance with statutory procedures governing notice, orders, and enforcement.

Administrative agencies possess only those powers expressly conferred by statute.

Campagna v. Shaffer, 73 N.Y.2d 237, 242 (1989); *Levine v.*

Whalen, 39 N.Y.2d 510, 518 (1976).

Because no lawful order was issued to Appellant under ECL § 27-1313(4), the Department lacked authority to impose enforcement consequences upon him based solely upon a historic registry entry.

E. Imposing 2009 Finality Upon a 2014 Owner Is Legally Impossible

Appellant became the owner of the property in 2014.

He was not:

- the subject of any alleged 2009 order,
- served with any such order,
- notified of any enforcement determination in 2009, or
- in a position to challenge the alleged classification at that time.

The Supreme Court's reasoning therefore leads to a legally untenable result: that Appellant's right to challenge the agency's action expired years before he acquired the property.

A statute of limitations cannot run against a person who had no legal interest in the property and was not subject to agency action at the time of the alleged determination.

To hold otherwise would retroactively extinguish the right to judicial review before that right ever arose.

F. Because the Alleged 2009 Action Was Not Binding Upon Appellant, the Statute of Limitations Could Not Have Accrued Against Him

Because Appellant was not the subject of a lawful enforcement order under ECL § 27-1313(4), the alleged 2009 classification could not have been final and binding upon him.

Without a final and binding determination directed to Appellant, the limitations period under CPLR § 217 could not have begun to run against him.

Accordingly, the Supreme Court erred as a matter of law in dismissing the Petition as time-barred.

**POINT VI : THE SUPREME COURT IMPROPERLY RELIED ON
LITIGATION AFFIDAVITS RATHER THAN THE ADMINISTRATIVE
RECORD IN REVIEWING THE DEC'S DETERMINATION**

The Supreme Court's dismissal of the Petition was based almost entirely upon affidavits submitted by the DEC during litigation rather than upon review of the administrative record underlying the agency's determination. This approach is inconsistent with the standards governing judicial review of administrative action under Article 78.

Article 78 review is confined to the administrative record that was before the agency when the challenged determination was made. Courts may not uphold agency action based on litigation affidavits that attempt to supply post-hoc explanations or factual assertions not contained in the administrative record.

Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000) (judicial review of administrative action must be based upon the record before the agency);

Scherbyn v. Wayne-Finger Lakes BOCES, 77 N.Y.2d 753, 758 (1991) (courts reviewing administrative action must determine whether the determination was supported by the record and made in accordance with law); *Pell v. Board of*

Educ., 34 N.Y.2d 222, 231 (1974) (administrative determinations must have a rational basis in the record).

This principle reflects a fundamental rule of administrative law: agencies must defend their decisions based upon the grounds invoked at the time the determination was made, not through post-litigation rationalizations. The United States Supreme Court articulated this rule in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), holding that an agency's action must be judged solely on the grounds articulated by the agency itself and not on new explanations advanced during litigation. Courts in New York have repeatedly applied the same principle in Article 78 proceedings.

The decision below departed from this rule.

Rather than reviewing the administrative record supporting the DEC's classification determination, the Supreme Court relied primarily on an affidavit submitted by a DEC employee asserting that the site had been classified as a Class 2 site in 2009. (A-1010) The court cited that affidavit and the documents attached to it as the basis for concluding that the classification occurred in 2009 and that the statute of limitations therefore expired four months later. (A-1010-1011)

The court also relied upon affidavits submitted by DEC personnel regarding service of the Petition and the receipt of mailed documents. (A-1009-1010)

These litigation affidavits became the primary evidentiary foundation for the court's dismissal of the Petition.

What is notably absent from the decision is any analysis of the administrative record underlying the alleged classification determination.

The decision does not identify the administrative determination that classified the site as a Class 2 site, does not analyze the evidentiary basis for that determination, and does not examine whether the DEC's classification complied with the statutory and regulatory criteria governing such determinations. Instead, the court accepted the agency's litigation assertions as proof that the classification occurred and treated those assertions as dispositive.

This approach is incompatible with the standards governing Article 78 review.

Under CPLR §7803(3), courts reviewing administrative determinations must determine whether the agency acted "in violation of lawful procedure," whether the determination was "affected by an error of law," and whether it was "arbitrary and capricious." Those determinations can only be made by examining the administrative record that formed the basis for the agency's action.

By relying on litigation affidavits rather than the administrative record, the court effectively substituted the DEC's post-litigation explanations for the agency's

actual determination. Courts may not uphold administrative action on the basis of such post-hoc rationalizations. *Montauk Improvement v. Proccacino*, 41 N.Y.2d 913, 914 (1977) (courts may not sustain administrative determinations on grounds not invoked by the agency); *Scherbyn*, 77 N.Y.2d at 758.

The problem is particularly significant in this case because the central issue raised by the Petition concerns whether the DEC lawfully classified the property as a “significant threat” site under the criteria set forth in 6 NYCRR §375-2.7. The decision below contains no examination of the scientific or regulatory record underlying that determination. Instead, the court simply accepted the DEC’s litigation position that a classification occurred in 2009 and treated that assertion as conclusive.

Such deference is incompatible with the role of the judiciary in reviewing administrative action.

Courts reviewing agency determinations must ensure that agencies act within the bounds of their statutory authority and that their determinations are supported by the record. Where a court fails to review the administrative record and instead relies on post-litigation affidavits, the resulting decision cannot satisfy the standards required under CPLR Article 78.

Because the Supreme Court relied on litigation affidavits rather than the administrative record supporting the DEC's alleged classification determination, the dismissal of the Petition was legally erroneous. The decision should therefore be reversed so that the DEC's classification may be reviewed on the basis of the administrative record and the governing statutory and regulatory framework.

**POINT VII:THE SUPREME COURT FAILED TO APPLY
THE REGULATORY CRITERIA DEFINING A
“SIGNIFICANT THREAT” UNDER 6 NYCRR §375-2.7**

The Petition challenged the DEC's classification of the site as a Class 2 “significant threat” property on the ground that the agency failed to satisfy the regulatory criteria governing such determinations under 6 NYCRR §375-2.7. The Supreme Court acknowledged that argument but never analyzed the governing regulatory framework.

In summarizing the Petition, the court noted that Petitioner argued the DEC's determination violated 6 NYCRR §375-2.7 because the agency failed to

demonstrate that contaminants present at the site posed a current or reasonably foreseeable threat to public health or the environment. The court further acknowledged that, under the regulation, “the mere presence of contaminants at a site is not a sufficient basis to find that the contaminants constitute a significant threat.” (A-1008)

New York’s Highest Court Has Rejected the Equation of “Hazardous Waste Presence” With “Significant Threat.”

New York’s highest court has expressly rejected the very analytical shortcut relied upon by the DEC and accepted by the Supreme Court below. In **New York State Superfund Coalition v. New York State Department of Environmental Conservation, 75 N.Y.2d 88 (1989)**, the Court of Appeals held that the Environmental Conservation Law does not permit the Department to treat the mere existence of hazardous waste as equivalent to a statutory finding of “significant threat.” The Court emphasized that the Legislature intentionally distinguished between sites where hazardous waste may be present and those that actually pose a **significant threat to public health or the environment**, explaining that DEC could not collapse those categories through regulatory interpretation or administrative presumption. *Id.* at 94–96. The Court invalidated the Department’s rule because it improperly allowed remedial consequences to

attach based solely on the presence or potential presence of hazardous waste without the factual showing of significant threat required by statute. *Id.* That holding directly reinforces the regulatory principle recognized in **6 NYCRR §375-2.7(a)(4)**—that “the mere presence of contaminants at a site is not a sufficient basis” for a significant-threat classification. Here, however, the Supreme Court effectively adopted the very presumption rejected by the Court of Appeals by accepting the DEC’s assertion that a registry listing and alleged historical classification conclusively established the existence of a significant threat without examining the evidentiary record or the regulatory criteria governing such determinations. Because New York law requires a demonstrated factual basis for a significant-threat finding, the court’s acceptance of administrative assertion in place of statutory analysis constitutes reversible legal error.

That regulatory principle lies at the core of the statutory scheme governing inactive hazardous waste sites.

Under ECL §27-1305, the DEC is authorized to classify sites on the Registry of Inactive Hazardous Waste Disposal Sites according to the level of threat they pose to public health or the environment. A Class 2 designation is reserved for sites that constitute a “significant threat to the public health or environment” and require action. ECL §27-1305(2)(b)(2).

The criteria governing such determinations are defined in 6 NYCRR §375-2.7.

That regulation establishes the analytical framework the DEC must use when determining whether a site constitutes a “significant threat,” including consideration of contaminant pathways, exposure potential, and the likelihood of impacts to public health or environmental resources.

The Petition squarely challenged whether those regulatory criteria were satisfied in this case.

Yet the Supreme Court never applied the regulation!

After acknowledging the argument based on 6 NYCRR §375-2.7, the court did not analyze the regulatory elements governing a significant threat determination, did not examine the evidentiary record supporting the classification, and did not determine whether the DEC satisfied the criteria required by the regulation.

Instead, the court relied on the DEC’s assertion that the site had been classified as a Class 2 site in 2009 and treated that assertion as dispositive of the case.

(A-1010-1011). The decision contains no discussion of the regulatory framework governing significant threat determinations and no analysis of whether the DEC complied with that framework.

This omission is fatal to the court’s reasoning.

Where a petitioner challenges an administrative determination on the ground that the agency failed to comply with the governing statute or regulations, the reviewing court must examine whether the agency applied the correct legal standard. Courts reviewing administrative action must determine whether the agency's determination was "affected by an error of law" or "arbitrary and capricious." CPLR §7803(3).

Failure to apply the governing regulatory standard constitutes reversible legal error. *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009) (agency determinations must be annulled where they are affected by an error of law); *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974) (courts must determine whether administrative determinations have a rational basis and were made in accordance with law).

Here, the court never evaluated whether the DEC's classification complied with the regulatory standard that it acknowledged governs the case. The decision therefore resolves the Petition without addressing the central legal question presented: whether the DEC lawfully determined that the site constitutes a "significant threat" under 6 NYCRR §375-2.7.

Instead, the court substituted deference to the DEC's assertion that a classification occurred in 2009 for the statutory analysis required under Article 78.

Because the Supreme Court failed to apply the regulatory criteria governing a significant threat determination, the court did not perform the judicial review required by CPLR Article 78. The decision should therefore be reversed so that the DEC's classification determination may be evaluated under the governing statutory and regulatory standards.

**POINT VIII: A FINAL “SIGNIFICANT THREAT” CLASSIFICATION
COULD NOT HAVE BEEN RENDERED IN 2009 BECAUSE THE DEC’S
OWN INVESTIGATIONS ESTABLISHED THAT THE SOURCE OF
CONTAMINATION WAS UNKNOWN AND THAT FURTHER
INVESTIGATION WAS REQUIRED**

The Supreme Court accepted the DEC's assertion that the subject property had been classified as a Class 2 “significant threat” site in March 2009 and treated that alleged classification as a final and binding administrative determination. Decision and Order at 5–6. That conclusion is legally and scientifically untenable because the DEC's own investigative record demonstrates that the factual prerequisites for such a classification did not exist in 2009.

A. Under New York Environmental Law a Class 2 Determination Requires Evidence That a Site Constitutes a “Significant Threat”

The Environmental Conservation Law establishes a specific framework for classification of inactive hazardous waste disposal sites.

Under **ECL §27-1305(2)(b)(2)**, a Class 2 site is defined as:

“a site at which hazardous waste constitutes a significant threat to the public health or environment and action is required.”

The determination that a site constitutes a “significant threat” must be made using the regulatory criteria contained in **6 NYCRR §375-2.7**, which require analysis of contaminant sources, migration pathways, exposure potential, and environmental impacts.

Without identifying the contaminant source and migration pathway, the regulatory analysis required by **6 NYCRR §375-2.7** cannot be completed. If the DEC had reached a final Class 2 “significant threat” determination in 2009, there would have been no reason for the *fifteen years* of continued investigation and testing that followed. That ongoing investigation confirms that no final determination had yet been made.

Accordingly, courts reviewing such determinations must ensure that the agency complied with the statutory and regulatory criteria governing classification. See: *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974)

Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009) (agency determinations affected by an error of law must be annulled).

Here, the DEC's own investigations demonstrate that the essential factual predicate for such a determination—the identification of the contamination source—had not been established in 2009. (A-230 *In 2008* "ATRS site...listed as 'P' potential...hazardous site...insufficient information exists to determine..."...A-231 *"To complete its reclassification...identification of conataminant source."*(Bold added)

B. The DEC's 2006-2008 Investigation Demonstrated That Groundwater Contamination Had No Identified Source

The earliest investigative record in the administrative history confirms that contamination detected in groundwater could not be attributed to the subject property.

A 2006 investigative letter submitted to the DEC reported that volatile organic compounds were detected in monitoring wells but exhibited **“no well-defined pattern.”** (A-219-221, A-230-254)

The investigation also concluded that the contamination could originate from multiple surrounding industrial sources, including nearby facilities historically

associated with petroleum storage, metal salvaging operations, and railroad activities.

(A-219-221)

The investigators further noted that gasoline-related compounds such as MTBE were detected in scattered locations, indicating that contamination could be originating from **“a source...other than the historical uses of the property.”**

(A-219-221)

These findings demonstrate that, as early as 2006, the available scientific evidence did not support a conclusion that the subject property was the source of contamination.

Without identifying the contamination source, the regulatory criteria for a significant-threat classification under **6 NYCRR §375-2.7** could not be satisfied.

C. The DEC’s Own Investigations Continued Through 2013 Because the Source of Contamination Remained Unknown

The DEC’s investigative work did not end in 2009 precisely because the required factual determinations had not been made. There is no record of testing between 2008 and 2013 reports.

Five years after the alleged 2009 classification, the DEC's contractor MACTEC prepared a **2013 Field Activities Report** for the Diamond Cleaners Site and the nearby ATRS property.(A-313-336)

That report confirms that the ATRS property (714 Baldwin Street) was still being investigated to determine the extent and source of contamination.

The report explains that the purpose of the 2013 investigation was:

“to monitor the effectiveness...of the remedial action at the DC Site and to assess soil and groundwater quality at the nearby ATRS Site.”

(A-313)

The results of that investigation confirmed that the contaminant source had still not been identified.

The report explicitly concluded:

“the contamination reported to date is residual and **the source area has not been identified.**”

(A-321 - Recommendations : #2)

Because the source remained unidentified, the report recommended further investigation, including:

- additional sampling to determine the extent of the groundwater plume;
- additional soil borings to determine the limits and **possibly the source** of contamination;
- potential interior sampling beneath the ATRS building to determine whether a source exists beneath the structure.

(A-321-322)

These recommendations confirm that, as of **2013**, the DEC still lacked the data necessary to determine the contamination source.

If the contamination source had not been identified in 2013, it necessarily follows that such a determination could not have been made in 2009.

D. Federal CERCLA Law Requires Identification of a Contamination Source Before Liability or Remedial Classification Can Be Determined

Federal environmental law follows the same principle.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), liability and remedial determinations require identification of a release or threatened release of hazardous substances and a nexus between the contamination and the responsible site. 42 U.S.C. §9607(a).

Courts applying CERCLA have consistently held that liability cannot be imposed absent evidence connecting the contamination to the site at issue. See:

***United States v. Bestfoods*, 524 U.S. 51, 66 (1998);**

***United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992).**

New York's hazardous waste site classification system under **ECL Article 27** operates within the same scientific and legal framework.

Without identifying the contamination source or migration pathway, the agency cannot rationally conclude that a specific property constitutes a "significant threat" site.

E. The DEC's Own Investigative History Demonstrates That a 2009 Alleged Classification Was Arbitrary and Unsupported

The DEC's investigative record therefore establishes the following timeline:

2006 investigation:

Contamination detected but **no defined source identified**.

2008 site characterization:

Further testing recommended to determine contamination source.

2009 Listing on the registry and (alleged classification):

No completed source determination.

2013 MACTEC investigation:

Source still unidentified; **additional investigation recommended.**

The DEC’s own contractor therefore confirmed that the fundamental question necessary for classification—identifying the contamination source—remained unresolved years after the alleged classification date.

Under New York administrative law, an agency determination must have a rational basis in the record. *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974).

A determination that a property constitutes a “significant threat” site cannot rationally be made when the agency’s own investigative record demonstrates that the source of contamination has not been identified and further testing is required.

F. The Alleged 2009 Classification Was Therefore Arbitrary, Capricious, and Contrary to Law

Because the DEC’s investigative record establishes that the contamination source had not been identified and further testing was required, the agency could not lawfully have determined in 2009 that the property constituted a Class 2 “significant threat” site.

The Supreme Court nevertheless accepted the DEC's assertion that such a classification occurred and treated it as a final administrative determination.

That conclusion ignores the scientific record and the statutory requirements governing site classification.

Accordingly, the alleged 2009 classification cannot constitute a lawful or final administrative determination under **ECL §27-1305**, **6 NYCRR §375-2.7**, or the standards governing judicial review of administrative action.

The decision should therefore be reversed.

POINT IX: THE REGISTRY LISTING IS INFORMATIONAL AND DOES NOT CONFER ENFORCEMENT JURISDICTION

The Supreme Court's dismissal rests on a fundamental legal error: the court treated the appearance of Petitioner's property on the Registry of Inactive Hazardous Waste Disposal Sites in 2009 as a final and binding jurisdiction-conferring determination that both authorized enforcement and triggered the statute of limitations. That premise is contrary to the governing statute and regulations.

A. The Governing Regulation Explicitly Provides That Registry Listing Is Informational and Does Not Confer Jurisdiction

The DEC's own regulations explicitly define the legal status of the Registry.

6 NYCRR § 375-2.7(b)(5) provides:

“The Registry is informational in nature, and a site is not required to be on the Registry to confer jurisdiction for action by the department according to statute or its implementing regulations.”

This regulatory provision performs two critical functions.

First, it expressly characterizes the Registry as **informational**, not adjudicatory.

Second, it explicitly denies that listing on the Registry **confers jurisdiction**.

Jurisdiction for enforcement actions therefore derives not from the publication of a site on the Registry but from the statutory authority provided in the Environmental Conservation Law.

The Supreme Court's reasoning collapses these two distinct concepts. By treating registry publication as a final and binding determination that set in motion enforcement authority and the statute of limitations, the decision effectively converts an informational regulatory tool into a jurisdiction-conferring adjudication. The regulation itself forecloses that interpretation.

If registry appearance does not confer jurisdiction, it cannot logically serve as the event that triggers finality for purposes of Article 78 review.

B. Enforcement Authority Arises Only After a Statutory Finding of “Significant Threat”

The Environmental Conservation Law establishes a clear statutory trigger for DEC enforcement authority.

ECL § 27-1313(3)(a) provides:

“Whenever the commissioner finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner... to develop and implement a remedial program.”

The statute therefore requires three sequential elements before enforcement authority arises:

1. A **finding by the Commissioner;**
2. That the site constitutes a **significant threat to public health or the environment;** and
3. Issuance of an **order directing investigation or remediation.**

The operative legal trigger is thus a **formal finding of significant threat**, not the mere act of listing a property on the Registry.

The Supreme Court's decision bypassed this statutory framework entirely. Rather than determining whether the DEC had lawfully made the required finding of significant threat under ECL § 27-1305 and the regulatory criteria set forth in 6 NYCRR § 375-2.7, the court treated registry listing itself as proof that such a determination had already been made.

The statute does not authorize such a presumption.

C. Even Assuming a 2009 Classification, Enforcement Against a Subsequent Owner Requires Notice and Opportunity for Hearing

Even if the DEC had rendered a valid Class 2 classification in 2009, enforcement authority against a subsequent owner cannot arise automatically.

ECL § 27-1313(4) expressly provides that:

“Any order issued pursuant to subdivision three... shall be issued only after notice and the opportunity for a hearing.”

The statute's use of the word “**any**” is comprehensive. It applies to every order issued under the statute, including orders directed to subsequent property owners.

Thus, even assuming *arguendo* that a Class 2 classification existed in 2009, enforcement authority against Petitioner—who did not acquire the property until years later—could arise only after:

1. Written notice directed to Petitioner as the subject of an order;
2. An opportunity to contest the determination through an administrative hearing and Rule 78 hearing if necessary; and
3. A final administrative determination following that process.

The Supreme Court’s analysis omits these statutory safeguards entirely. By treating the 2009 registry entry as both final and permanently binding upon all subsequent owners, the decision effectively nullifies the notice-and-hearing requirement mandated by ECL § 27-1313(4).

Nothing in the Environmental Conservation Law authorizes such perpetual enforcement jurisdiction.

D. The DEC’s Own Investigative Record Demonstrates That No Final Significant-Threat Determination Existed in 2009

The DEC’s investigative history further undermines the premise that a final significant-threat determination existed in 2009.

Investigations conducted for the DEC repeatedly concluded that the source of contamination had not been identified and that additional investigation was required. The DEC's contractor later reported that contamination detected at the site appeared residual and that the **“source area has not been identified.”**

The report therefore recommended additional soil borings, groundwater sampling, and further investigation to determine the limits and potential source of contamination.

A regulatory classification premised on incomplete data and continuing investigation cannot simultaneously be treated as a final scientific determination of significant threat.

Under 6 NYCRR § 375-2.7(a)(4):

“The mere presence of contaminants at a site is not a sufficient basis for a finding that the site constitutes a significant threat.”

The DEC's investigative reports align with that regulatory principle. They do not document a completed risk determination establishing that the property constituted a significant threat; rather, they identify unresolved data gaps and recommend additional investigation to determine whether such a finding could be made.

E. An Informational Registry Entry Cannot Trigger Finality for Statute-of-Limitations Purposes

The Supreme Court concluded that the statute of limitations began to run in March 2009 when the site was listed on the Registry.

That conclusion is incompatible with the governing standards for administrative finality.

Under CPLR § 217(1), an administrative determination becomes final and binding only when the agency has reached a definitive position that inflicts concrete injury upon the party seeking review. *Best Payphones, Inc. v. Department of Information Technology & Telecommunications*, 5 N.Y.3d 30, 34 (2005); *Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, 223 (2003).

An informational registry entry does not meet that standard.

Registry listing does not confer jurisdiction, does not constitute a final adjudication, and does not itself impose a remedial obligation on a property owner. Indeed, the DEC's continued investigation of the site years after the alleged 2009 classification demonstrates that the agency itself did not treat the matter as a completed administrative determination.

Where an agency continues to investigate the factual basis for regulatory action, courts have repeatedly held that the agency has not yet reached a final and binding determination.

F. The Lower Court's Analysis Improperly Conflates Registry Listing with Statutory Enforcement Authority

The Supreme Court's reasoning ultimately rests on a conflation of two legally distinct concepts:

- **Informational registry listing, and**
- **Statutory enforcement jurisdiction under ECL § 27-1313.**

The governing regulation explicitly rejects that conflation. The statute requires a formal finding of significant threat and compliance with notice and hearing requirements before enforcement authority arises.

The DEC's own scientific record further demonstrates that the factual prerequisites for such a finding had not been established at the time the site was placed on the Registry.

Because the Supreme Court treated registry publication itself as a final and binding determination triggering enforcement authority and the statute of limitations, the dismissal of the Petition rests upon an error of law.

The decision should therefore be reversed so that the legality of the DEC's actions may be evaluated under the governing statutory and regulatory framework.

Because the Registry Is Informational, Its Publication Cannot Confer Enforcement Jurisdiction or Trigger Final Agency Action

The Supreme Court's decision rests on the premise that the listing of the property on the Registry of Inactive Hazardous Waste Disposal Sites in 2009 constituted a final and binding administrative determination. (A-1010-1011). That premise is legally incorrect.

Under the Environmental Conservation Law, the Registry is an informational inventory maintained by the Department of Environmental Conservation to identify locations where contamination may exist and to guide further investigation and remediation.

ECL §27-1305(1) provides that the Department:

“shall maintain a registry of inactive hazardous waste disposal sites in the state.”

The statute further requires that sites placed on the Registry be classified according to categories *reflecting their potential threat* to public health or the environment. **ECL §27-1305(2)**.

Nothing in the statute provides that the mere appearance of a site on the Registry constitutes a final administrative determination or an adjudicatory finding binding upon property owners.

To the contrary, the Registry serves as a **regulatory tool for investigation and remediation planning**, not as a final adjudication of liability or contamination source.

This structure is reflected in the DEC's implementing regulations.

Under **6 NYCRR §375-2.7**, classification of a site as a Class 2 "significant threat" requires a technical evaluation of the site based upon environmental data and exposure pathways. That regulatory analysis necessarily depends on the results of site investigations, including identification of contamination sources and migration pathways.

Because site investigations frequently evolve over time as new data becomes available, the Registry functions as a **dynamic informational record**, not a final determination immune from later review.

Courts reviewing administrative action have consistently held that a determination becomes "final and binding" only when the agency has reached a definitive

position that inflicts concrete injury upon the party seeking review. CPLR

§217(1); see also:

Best Payphones, Inc. v. Department of Information Technology &

Telecommunications of City of N.Y., 5 N.Y.3d 30, 34 (2005);

Stop-the-Barge v. Cahill, 1 N.Y.3d 218, 223 (2003).

Under these principles, an agency action cannot be considered final where the agency continues to investigate the underlying conditions or where the factual basis for the determination remains unresolved.

The record in this case demonstrates precisely such an ongoing investigative process.

The DEC's own contractor reports show that the source of contamination at the ATRS property had not been identified and that additional investigation was required years after the alleged 2009 classification. As noted in the 2013 MACTEC investigation report, the contamination detected at the ATRS property was residual and **“the source area has not been identified.”**

(A-321)

The report therefore recommended further investigation, including additional soil borings and groundwater sampling to determine the limits of contamination and potentially identify the source.

(A-321-322)

These findings confirm that the DEC itself did not treat the alleged 2009 classification as a final determination.

Instead, the agency continued to investigate the site for years afterward up until 2024 in order to attempt to determine the source which remains inconclusive and extent of contamination.

Where an agency continues to investigate the conditions underlying a regulatory action, courts have repeatedly held that the agency has not yet reached a final and binding determination. See:

Matter of Gordon v. Rush, 100 N.Y.2d 236, 242 (2003) (agency action is not final where further investigation or administrative steps remain);

Matter of Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998) (finality requires a definitive position that inflicts concrete injury).

The Supreme Court's decision ignores this principle.

Instead of determining whether the DEC had reached a final and binding determination regarding the classification of the site, the court treated the existence of a Registry entry as dispositive proof that such a determination had already occurred.

This reasoning collapses the statutory framework governing inactive hazardous waste sites.

The Registry is designed to identify potential sites for investigation and remediation. It does not function as a final adjudication of contamination source, liability, or significant threat status.

Treating the Registry listing itself as a final administrative determination improperly converts an informational regulatory tool into a binding adjudication without any of the procedural safeguards required for such determinations.

Because the Supreme Court relied upon this erroneous premise in dismissing the Petition, the decision rests upon an error of law.

**POINT X: THE SUPREME COURT IMPROPERLY DEFERRED TO THE
DEC'S LITIGATION ASSERTIONS RATHER THAN CONDUCTING
THE JUDICIAL REVIEW REQUIRED UNDER ART. 78**

The Supreme Court's decision reflects a fundamental misunderstanding of the role of the judiciary in reviewing administrative action. Instead of examining whether the DEC complied with the governing statutory and regulatory framework, the court accepted the agency's litigation assertions as dispositive and dismissed the Petition without conducting the judicial review required under CPLR Article 78.

Article 78 review exists precisely to ensure that administrative agencies act within the limits of their statutory authority and comply with lawful procedure. Under **CPLR §7803(3)**, courts must determine whether an agency determination:

“was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion.”

The Court of Appeals has repeatedly emphasized that courts reviewing administrative action must independently evaluate whether the agency's determination has a rational basis in the record and whether the agency complied with the governing legal framework. See:

***Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974);**

Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009).

Judicial review therefore requires more than accepting the agency's description of its own actions. Courts must examine the administrative record and determine whether the agency actually satisfied the statutory conditions necessary for its determination.

The Supreme Court did not perform that analysis!

Instead, the court accepted the DEC's assertion that the property had been classified as a Class 2 site in 2009 and treated that assertion as dispositive proof that a valid classification determination had occurred. (A-1010-1011) The court then relied upon that assertion to conclude that the statute of limitations expired four months later and dismissed the Petition without examining whether the classification determination satisfied the statutory criteria governing such determinations.

This reasoning effectively substitutes administrative assertion for judicial review.

Courts reviewing agency action may not simply accept an agency's litigation position as proof that the agency acted lawfully. As the Court of Appeals has explained, the purpose of Article 78 review is to ensure that agencies remain within the bounds of their statutory authority. ***Pell, 34 N.Y.2d at 231.***

Where a court accepts the agency's characterization of its own actions without examining whether those actions complied with the governing statutes and regulations, the court abdicates the judicial function assigned by Article 78.

The record in this case demonstrates why such review is necessary.

The DEC's own investigative reports show that the source of contamination at the ATRS property remained unidentified and that additional investigation was recommended years after the alleged 2009 classification. As the DEC's contractor reported in 2013, the contamination detected at the ATRS property was residual and **“the source area has not been identified.”**

(A-321)

The report therefore recommended additional soil borings, groundwater sampling, and further investigation to determine the limits of contamination and potentially identify the source.

(A-321-322)

These findings directly contradict the premise that the DEC had already reached a final determination in 2009 that the site constituted a “significant threat” requiring action.

Yet the Supreme Court did not address this contradiction or analyze whether the DEC's classification determination satisfied the criteria set forth in **ECL §27-1305** and **6 NYCRR §375-2.7**.

Instead, the court simply accepted the DEC's assertion that the classification occurred and treated that assertion as dispositive.

Such deference is incompatible with the standards governing judicial review of administrative action.

Courts reviewing agency determinations must ensure that agencies act within the limits of their statutory authority and that their determinations are supported by the record. Where a court fails to conduct that review and instead accepts the agency's litigation assertions as conclusive, the resulting decision cannot satisfy the requirements of Article 78.

Because the Supreme Court deferred to the DEC's assertions rather than examining whether the agency complied with the governing statutory and regulatory framework, the dismissal of the Petition rests upon an error of law.

Accordingly, the decision should be reversed so that the legality of the DEC's classification and enforcement actions may be reviewed under the proper standards governing administrative action.

**POINT XI: THE DEC'S ACTIONS WERE ULTRA VIRES AND
THEREFORE SUBJECT TO JUDICIAL REVIEW NOTWITHSTANDING
THE STATUTE OF LIMITATIONS**

Even if this Court were to accept the premise that the DEC purported to classify the subject property as a Class 2 site in 2009, the Petition cannot be barred by the statute of limitations because the agency's actions were ultra vires.

An administrative agency possesses only those powers expressly granted by statute. When an agency acts beyond the authority conferred by the Legislature, its actions are void and may be challenged at any time. See:

New York State Assn. of Counties v. Axelrod, 78 N.Y.2d 158, 166

(1991) (agency action exceeding statutory authority is ultra vires and invalid);

Parkview Assoc. v. City of New York, 71 N.Y.2d 274, 282 (1988)

(governmental acts taken without statutory authority are void);

Schulz v. State of New York, 81 N.Y.2d 336, 347 (1993) (courts retain authority to review governmental action taken in excess of statutory powers).

Where an agency acts outside the scope of its statutory authority, the statute of limitations applicable to ordinary administrative determinations does not bar judicial review. Courts have consistently recognized that ultra vires governmental conduct may be challenged notwithstanding limitations periods applicable to routine administrative determinations.

The DEC's alleged classification of the property as a Class 2 "significant threat" site in 2009 falls squarely within this principle.

As demonstrated above, the DEC's own investigative record establishes that the factual prerequisites required for a significant threat determination did not exist at that time. The Environmental Conservation Law authorizes such classifications only when the agency determines that hazardous waste at a site "constitutes a significant threat to the public health or environment." ECL §27-1305(2)(b)(2).

That determination must be made in accordance with the regulatory criteria governing site classification under **6 NYCRR §375-2.7**, which require analysis of contaminant sources, migration pathways, and exposure risks.

The DEC's investigative record demonstrates that those requirements had not been satisfied.

Investigations conducted for the DEC concluded that contamination detected at the ATRS property did not exhibit a defined source and that additional investigation was necessary to determine the origin of the contamination. The DEC's contractor later confirmed that the contamination observed at the ATRS site appeared residual and that **“the source area has not been identified.”**

(A-321)

The report therefore recommended additional investigation, including further soil borings, groundwater sampling, and potential interior sampling beneath the building to identify a contamination source.

(A-233)

These findings demonstrate that the DEC lacked the scientific data necessary to determine that the site constituted a “significant threat” within the meaning of ECL §27-1305 and 6 NYCRR §375-2.7.

Without identifying the contamination source or establishing the conditions required by the regulatory criteria governing significant threat determinations, the DEC lacked the statutory authority to classify the site as a Class 2 property.

An administrative action taken without the statutory prerequisites required by law is ultra vires.

Courts have repeatedly held that agency actions taken in excess of statutory authority cannot be insulated from judicial review through procedural defenses such as statutes of limitation. *Schulz, 81 N.Y.2d at 347.*

The Supreme Court nevertheless accepted the DEC's assertion that a valid classification determination occurred in 2009 and treated that assertion as a final administrative determination immune from judicial review.

That reasoning would allow an agency to evade judicial scrutiny simply by asserting that an unlawful action occurred long ago. Such a rule would undermine the fundamental principle that administrative agencies must act within the limits of the authority granted to them by the Legislature.

Because the DEC's alleged classification of the property as a Class 2 site was undertaken without satisfying the statutory and regulatory prerequisites governing such determinations, the agency acted beyond its statutory authority.

An ultra vires action is void.

Accordingly, the statute of limitations applicable to ordinary administrative determinations cannot bar judicial review of the DEC's unlawful classification and enforcement actions.

The decision below should therefore be reversed and the Petition reinstated so that the legality of the DEC's actions may be reviewed under the governing statutory and regulatory framework.

CONCLUSION

This appeal arises from a fundamental failure of judicial review. Rather than determining whether the New York State Department of Environmental Conservation complied with the statutory and regulatory framework governing hazardous waste site classification, the Supreme Court accepted the agency's litigation assertions as dispositive and dismissed the Petition without examining whether the agency acted within the authority granted by the Legislature.

Article 78 review exists precisely to prevent such outcomes. Under CPLR §7803(3), courts must determine whether an administrative determination was made without jurisdiction, in violation of lawful procedure, affected by an error of law, or arbitrary and capricious. The Court of Appeals has repeatedly emphasized that courts must independently examine whether administrative action has a rational basis in the record and complies with the governing legal framework. *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974); *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009).

The decision below did not perform that analysis. Instead, the court accepted the DEC's assertion that the property had been classified as a Class 2 site in 2009 and treated that assertion as dispositive proof that a lawful administrative determination had occurred.

On that premise alone, the court concluded that the statute of limitations expired four months later and dismissed the Petition.

That reasoning bypasses the statutory framework governing hazardous waste site classification. Under ECL §27-1305(2)(b)(2), a site may be classified as a Class 2 site only when the agency determines that hazardous waste at the site constitutes a “significant threat to the public health or environment.” The regulatory criteria governing that determination are set forth in 6 NYCRR §375-2.7, which requires analysis of contaminant sources, migration pathways, and exposure risks.

The record demonstrates that those prerequisites had not been satisfied. The DEC’s own investigative reports acknowledge that the source of contamination had not been identified and that further investigation was required. Without identifying a contamination source or establishing the conditions required by the governing regulation, the agency could not lawfully determine that the property constituted a Class 2 “significant threat” site.

Nevertheless, the Supreme Court treated the existence of a Registry entry as proof that a lawful classification determination had already occurred. That premise is legally incorrect. The Registry maintained under ECL §27-1305 is an informational inventory of sites requiring investigation and remediation planning; it is not a final adjudication of contamination source or significant-threat status.

Administrative determinations become final and binding only when the agency has reached a definitive position that inflicts concrete injury upon the party seeking review. *Best Payphones, Inc. v. Department of Information Technology & Telecommunications*, 5 N.Y.3d 30, 34 (2005); *Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, 223 (2003). The DEC's own investigative record demonstrates that no such final determination existed here.

Even if the agency purported to classify the property in 2009, such action would have been undertaken without satisfying the statutory prerequisites

required by the Environmental Conservation Law and its implementing regulations.

Administrative actions taken without statutory authority are ultra vires and void. *New York State Assn. of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991); *Parkview Assoc. v. City of New York*, 71 N.Y.2d 274, 282 (1988).

Because an ultra vires action is void, it cannot be insulated from judicial review through procedural defenses such as statutes of limitation. *Schulz v. State of New York*, 81 N.Y.2d 336, 347 (1993).

The decision below therefore rests on multiple errors of law. The court treated a Registry entry as a final administrative determination, failed to examine whether the DEC satisfied the statutory requirements governing site classification, relied on litigation affidavits rather than the administrative record, misapplied the statute of limitations, and deferred to the agency rather than performing the judicial review required under Article 78.

Taken together, these errors prevented the court from addressing the central question presented by the Petition: whether the DEC lawfully classified the property as a Class 2 “significant threat” site under the governing statutory and regulatory framework.

Because that question was never analyzed, *the decision cannot stand*.

REQUESTED RELIEF

For the foregoing reasons, Appellant respectfully requests that this Court grant the following relief:

1. **Reverse the Decision and Order of the Supreme Court, Chemung County**, which dismissed the Petition and denied judicial review of the

actions of the New York State Department of Environmental Conservation (“DEC”).

2. **Annul the DEC’s purported classification of the subject property as a Class 2 “significant threat” site**, on the grounds that the classification was made in violation of the statutory and regulatory framework governing inactive hazardous waste sites, including **ECL §27-1305, ECL §27-1313, and 6 NYCRR Part 375**, and therefore constitutes an **ultra vires administrative action**.
3. **Declare the alleged 2009 classification void**, because the statutory prerequisites required to support such a determination had not been established and the agency’s own investigative record demonstrates that the contamination source remained unidentified and required further investigation.
4. **Vacate and extinguish all subsequent enforcement actions, the 2017 & 2025 orders on consent, investigative mandates, testing requirements, and reports derived from or premised upon that unlawful classification**, including any orders or directives obtained through coercive or unlawful entry, testing, or administrative enforcement actions taken after the purported classification.

5. **In the alternative**, should this Court determine that the matter should proceed through the administrative process, **direct the DEC to recommence the statutory process from the point at which lawful procedures ceased**, consistent with the investigative posture reflected in the DEC's 2013 contractor reports, and require the agency to proceed in accordance with the notice and hearing provisions of **ECL §27-1313(3)(a)** and **ECL §27-1313(4)**.
6. **Order that Appellant be provided proper statutory notice of any proposed classification determination**, together with the opportunity for an administrative hearing at which Appellant may contest the factual and legal basis for any such determination before it becomes final.
7. **Award Appellant reimbursement of litigation expenses incurred in bringing this proceeding**, including filing fees, postage expenses, printing and paper costs, and other documented costs associated with this litigation, in the amount of **\$1,380.00**.
8. Grant such other and further relief as this Court deems just and proper.

Respectfully Submitted,
Julian Raven



Addendum

1. Improper Reliance on the Affidavit of Kira Bruno

The Supreme Court's conclusion that the property was classified as a Class 2 site in 2009 rests almost entirely on the affidavit of Kira Bruno, identified as an Environmental Program Specialist Trainee with the DEC. As a trainee-level employee, Ms. Bruno with a degree in sustainability, holds an entry-level position and possesses no identified professional licensure, engineering certification, or specialized scientific credentials qualifying her to render expert conclusions regarding hazardous waste classification.

Her affidavit does not constitute expert testimony, a contemporaneous administrative determination, or scientific analysis of the site. Instead, it is a retrospective litigation statement summarizing the agency's present interpretation of historical events that allegedly occurred many years before her involvement with the agency or the site.

Under Article 78 review, courts must determine whether an agency's action is supported by the administrative record and complies with governing statutory and regulatory standards. CPLR §7803(3); *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974). Agencies cannot establish the legality of contested determinations through post-hoc litigation affidavits that merely summarize agency records or offer retrospective explanations. *Matter of Scherbyn v. Wayne-Finger Lakes BOCES*, 77 N.Y.2d 753, 758 (1991).

Here, the court accepted the affidavit of a trainee-level employee as conclusive proof that a lawful Class 2 classification occurred in 2009 without examining whether the statutory and regulatory prerequisites for such a determination were satisfied. This substituted administrative assertion for record-based judicial review.

A. Exhaustion of Administrative Remedies Was Not Required

The Supreme Court further erred in concluding that this proceeding was premature because petitioner allegedly failed to exhaust administrative remedies.

Exhaustion is not required where an agency is alleged to have acted without jurisdiction or in excess of its statutory authority. CPLR 7803(2); *Watergate II Apts. v Buffalo Sewer Auth.*, 46 N.Y.2d 52 (1978).

Here, petitioner does not merely challenge the correctness of the DEC's classification determination. Rather, petitioner challenges the **lawfulness of the classification itself**, including whether the DEC ever lawfully imposed a Class 2 designation on the property with notice and in compliance with *ECL §27-1305 and 6 NYCRR §375-2.7*.

Administrative review procedures allowing petitions for **reclassification** presume the validity of the underlying classification and are therefore not a remedy for an unlawful designation imposed without jurisdiction.

Moreover, exhaustion is not required where pursuit of administrative remedies would be **futile**. *Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 N.Y.2d 136 (1995).

The DEC maintains that the site was classified as Class 2 in 2009. Any petition for reclassification would therefore require petitioner to accept the validity of that alleged classification — the very action petitioner contends was unlawful and void.

Under these circumstances, requiring exhaustion would improperly force petitioner to validate the agency action he challenges.

Because petitioner seeks judicial review of **whether the DEC possessed lawful authority to impose the classification at all**, the exhaustion doctrine does not apply.

PROPOSED ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION**

Julian Marcus Raven,
Appellant,

v.

New York State Department of Environmental Conservation, et al.,
Appellees.

ORDER

Upon the record on appeal, the briefs of the parties, and due deliberation having been had thereon,

IT IS HEREBY ORDERED AND ADJUDGED that the Decision and Order of the Supreme Court, Chemung County (Baker, J.), entered in this matter dismissing the Petition pursuant to CPLR Article 78, is **reversed**, on the law; and it is further

ORDERED that the determination of the New York State Department of Environmental Conservation purporting to classify the property located at **714 Baldwin Street, Elmira, New York** as a **Class 2 “Significant Threat” site** on the Registry of Inactive Hazardous Waste Disposal Sites is **annulled and declared void ab initio**, having been made without compliance with the governing statutory and regulatory framework, including **Environmental Conservation Law §§27-1305 and 27-1313 and 6 NYCRR §375-2.7**, and without the procedural notice required by law; and it is further

ORDERED that all enforcement actions, directives, investigative demands, and remedial requirements predicated upon said unlawful classification are **vacated and extinguished**; and it is further

ORDERED that the property known as **714 Baldwin Street, Elmira, New York**, shall be **removed from the Registry of Inactive Hazardous Waste Disposal Sites as a Class 2 site**, and that any further regulatory action concerning the property must be initiated anew in full compliance with the Environmental Conservation Law and applicable regulations; and it is further

ORDERED, in the **alternative**, that should the Court determine that additional proceedings are required, the matter is **remitted for further proceedings before a different Justice of the Supreme Court**, other than the Honorable Christopher P. Baker, to ensure a neutral adjudication consistent with the Court's decision and the requirements of law; and it is further

ORDERED that Petitioner–Appellant is awarded **costs and disbursements of this appeal**, together with such other and further relief as the Court deems just and proper.

Dated: _____

Clerk of the Court

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION**

JULIAN MARCUS RAVEN,
Petitioner-Appellant,

v.

**NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, et al.,**
Respondents-Respondents.

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to **22 NYCRR §1250.8(j)** that the foregoing brief was prepared on a computer using a proportionally spaced typeface.

Typeface: Times New Roman **Point Size:** 14-point

I further certify that the total word count of the brief, **excluding** the parts of the brief exempted by rule (table of contents, table of authorities, proof of service, certificate of compliance, cover page, and addenda containing statutes or regulations), is: **13,803 words. 14,087** with added appendix references. The brief therefore **complies with the 14,000 word limit** set forth in **22 NYCRR §1250.8(b)**.

Respectfully submitted,

Julian Raven



Appellant, Pro Se

AFFIRMATION OF SERVICE

(Service by NYSCEF Electronic Filing)

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT**

Julian Marcus Raven,
Petitioner–Appellant,

v.

New York State Department of Environmental Conservation, et al.,

Respondents–Respondents.

Index No.: 2025-1215

I, **Julian Marcus Raven**, affirm under penalty of perjury pursuant to **CPLR §2106** that the following is true:

1. I am the Petitioner–Appellant in the above-captioned action and am over the age of eighteen years.
2. On the 15 day of March, 2026, I electronically filed the following documents with the **New York State Courts Electronic Filing System (NYSCEF)** in this matter:
 - Appellant’s Brief
 - Appendix / Addendum
 - Proposed Order
 - Certificate of Compliance
 - Table of Authorities
 - and accompanying appellate papers.

3. Pursuant to **22 NYCRR §202.5-b**, the electronic filing of these documents through the NYSCEF system constitutes service upon all counsel and parties who have appeared in this action and who are registered participants in the NYSCEF system.
4. Upon filing, the NYSCEF system automatically generated and transmitted notice of filing to all registered participants, thereby effecting service.

I affirm this 15th day of March, 2026, under the penalties of perjury under the laws of the State of New York.

A handwritten signature in blue ink, appearing to read "Julian Raven". The signature is fluid and cursive, with a large initial "J" and "R".

Julian Raven

Petitioner–Appellant, Pro Se

714 Baldwin St.

Elmira, New York, 14901