SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF CHEMUNG

In the Matter of the Application of

JULIAN MARCUS RAVEN,

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR and Interim Relief under CPLR §§ 6301 and 7805,

– against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al.,

Respondents.

****PETITIONER'S REPLY MEMORANDUM AND SUPPLEMENTAL AFFIDAVIT #2**

IN FURTHER SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER**

I. PRELIMINARY STATEMENT

Petitioner Julian Marcus Raven submits this reply memorandum and accompanying supplemental affidavit in further support of his pending motion for a Temporary

Restraining Order ("TRO") pursuant to **CPLR §§ 6301 and 7805**.

Respondents' opposition, filed November 7, 2025, fails to confront the material facts or governing law. It mischaracterizes the relief sought, evades undisputed sworn evidence, and relies on procedural deflection and sweeping and unsubstantiated claims to statutory authority, rather than substance. The record demonstrates continuing and irreparable harm arising from respondents' unlawful classification and subsequent public dissemination of a false "Class #2 significant threat" and their disregard of the notice and due-process safeguards mandated by **ECL 27-§1313-4** & **6 NYCRR Part 375 -2.7 (b) 1-6**.

II. SUBMISSION OF SUPPLEMENTAL AFFIDAVIT #2

Petitioner also submits **Supplemental Affidavit #2** (executed Nov 10 2025) with Exhibits D through J documenting continuing bad-faith conduct and irreparable injury:

1. **Failure of Notice.** While abroad in 2023 caring for an ill parent, petitioner obtained written assurance from the DEC that he would receive notice of any public meeting or final determination because of both his rights, and the reputation of his tenant. The Department instead announced its "significant threat" classification on March 12, 2025 to the public, online and through the media without notice.(Exhibits D)
2. **Economic Loss.** Petitioner's tenant on March 27, 2024, just over two weeks after the public announcement, ended his lease, causing unrecoverable income loss.

3. **Unlawful OOC & No Notice.** The DEC issued another unlawful "Significant Threat" OOC on September 5th, 2025 in violation of ECL §27-1313 3(a),4., perpetuating misclassification, no lawful procedure, no notice and no appeal, no due process.(Exhibit H)
4. **Reputational Damage.** Attached Exhibit E shows a Facebook Marketplace comment—"Isn't this place extremely polluted?"—demonstrating public acceptance of the false narrative. Such stigmatization constitutes irreparable harm. *Doe v. Axelrod*, 71 N.Y.2d 484 (1988).
5. **Constitutional Irreparable Injuries.** Public dissemination of a hazardous classification without notice or opportunity to respond violates property and liberty interests protected by the **Fourth, Fifth, and Fourteenth Amendments**. *John P. v. Whalen*, 54 N.Y.2d 89 (1981).

These facts refute respondents' assertion of "no immediate harm." The harm is active, measurable, and ongoing.

III. SUPPLEMENTAL AFFIDAVIT NOT A SUR-REPLY

Respondent's reliance on 22 NYCRR § 202.8-c is misplaced. The supplemental affidavit submitted by Petitioner does **not** constitute a sur-reply or impermissible post-submission argument; rather, it supplements the factual record in direct response to ongoing and newly emergent circumstances, including Mr. Buttino's own words, materially affecting the pending motion. The rule cited governs *additional argument* on a *fully submitted motion*, not the submission of clarifying or evidentiary materials necessary for the Court's equitable consideration of a TRO where the underlying

conditions continue to evolve. Courts have repeatedly recognized that “a court of equity is not rigidly bound by procedural technicalities where new or continuing facts bear directly upon the relief sought” (*see e.g.*, *Matter of Sessa v. State of New York*, 88 A.D.2d 856 [2d Dep’t 1982]; *Mulligan v. Lackey*, 33 A.D.2d 991 [2d Dep’t 1970]). The supplemental affidavit was therefore properly submitted in good faith to ensure the Court possesses an accurate and current factual record before ruling on injunctive relief, not to reopen argument in violation of the Rule.

Concession of Misclassification

Thus, Respondents’ silence regarding the **March 6, 2017 Order on Consent** and its conflation of 714 Baldwin Street with the *Perfecto Dry Cleaners* site, as the misclassification nexus beneath all of Respondent’s subsequent injurious unlawful activity, including Mr. Buttino’s dishonorable defense — is dispositive. Under *Matter of McCormack v. Axelrod*, 59 N.Y.2d 574 (1983), unrebutted sworn facts in the motion record are deemed admitted.

The DEC’s own document proves that every subsequent classification, notice, and public statement rests on a foundational error of site identity. By ignoring this, the Attorney General effectively concedes that the agency acted **ultra vires** and that its claimed statutory authority was derived from a mistake of fact, not law.
As *Charles A. Field Delivery Serv., Inc. v. Roberts*, 66 N.Y.2d 516 (1985) holds, agency action taken contrary to its own procedures or without jurisdiction is ***void ab initio***.

IV. SUBSTANTIVE REBUTTAL TO RESPONDENT'S OPPOSITION

Respondents Misstate the Nature of the Relief Sought

Respondents attempt to reframe this motion as an improper bid for a *preliminary injunction* instead of a temporary restraining order. This is a straw-man argument. **CPLR § 6301** expressly covers both TROs and preliminary injunctions, using identical criteria: the defendant *"is doing, threatens, or is procuring or suffering to be done"* an act violating plaintiff's rights. The distinction is temporal, not substantive. The urgent harms addressed here — reputational, economic, and constitutional — are *occurring now* and therefore squarely within § 6301's scope. Courts routinely grant TROs to halt continuing administrative harm pending full argument. *See John P. v. Whalen*, 54 N.Y.2d 89 (1981).

Misrepresentation of Petitioner's Affidavit

Respondents open their opposition by falsely asserting that "Petitioner acknowledged in his November 7, 2025 affidavit that there is no immediate harm." (Opp. at 1.) That statement is demonstrably untrue. Petitioner's affidavit contains no such admission. On the contrary, it describes continuing reputational, economic, and constitutional harms caused by the Department's ongoing public dissemination of a false "significant threat" classification, procedural violations and ongoing bad faith.

The quoted language appears nowhere in the sworn record. It appears respondents have either miscited their own document **(NYSCEF Doc. No. 8)** or mischaracterized

petitioner's description of the *Department's own claim* that no immediate field activity was planned.

Such distortion of the record underscores the respondents' inability to engage with the substance of the harm and should be disregarded. *See* CPLR 2101(f) (defective papers disregarded if no prejudice) and *People v. D'Alessandro*, 184 A.D.2d 114, 118 (1st Dep't 1992) (courts reject "argument based on factual mischaracterization of the record").

"Lack of AN imminent harm" nonsense

The State's very phrasing—"based on the lack of an imminent harm"—in the *first* paragraph, betrays the haste and carelessness with which the opposition was drafted. There is no such expression in standard English usage; *harm* in this context is an uncountable noun, and the correct form would be "lack of imminent harm" or "lack of any imminent harm." The insertion of the article "an" before "imminent harm" is grammatically incorrect and legally imprecise, reflecting a fundamental inattention to both language and law. This seemingly minor error is symptomatic of a rushed, boilerplate filing that misstates the Petitioner's affidavit, misattributes NYSCEF document numbers, and mischaracterizes the very standard it purports to apply.

The grammatical flaw is not trivial—it *creates* a false premise. By writing of "an imminent harm," the Attorney General's office mischaracterizes Petitioner's TRO as though it were premised on some discrete or peculiar "an harm," when Petitioner made no such claim. Ironically, the State is inadvertently correct in one respect: Petitioner is not arguing for some grammatically nonsensical "an imminent harm," but rather for the

recognition of *imminent harm itself*—real, ongoing, and legally cognizable under CPLR 6301.

"...A remedial action…" nonsense

The errors compound quickly. By the very start of paragraph two, the State again stumbles—declaring that "the Department has no plans to conduct *a remedial action*." That phrase is not even proper English, nor is it a formulation found anywhere in statute or DEC regulation. The term *remedial action* is a collective process term, not a singular countable event, and its misuse here reveals both linguistic and conceptual confusion. Under ECL Article 27 and DER-10, remedial action encompasses investigation, planning, contracting, and public notice—all of which can and do occur well before physical entry or excavation. Thus, when the State claims it has "no plans to conduct a remedial action," it commits not only a grammatical blunder but a misleading representation of fact, implying total inaction when the machinery of remediation is already in motion. The phrasing again underscores that this filing was drafted in haste, detached from the statutory framework it purports to invoke.

TRO not moot

The so-called stipulation offered in paragraph two is a rhetorical head fake, not a meaningful concession. It presumes statutory authority under ECL §§27-1309 and 27-1313, as though the Department's underlying "significant threat" classification were valid and uncontested, while entirely sidestepping that very issue—the lawfulness of the classification itself. The promise of "no plans to conduct a remedial action before January 6" does nothing to cure the ongoing prejudice caused by the misclassification

and the continuing procedural violations surrounding it. Worse still, it misrepresents the character and scope of Petitioner's TRO, as though the requested restraint were limited only to physical "remedial action," when in fact the Department's remedial process is already in motion: drilling, occupying, taking, planning, contracting, data compilation, and public dissemination are all active components of that same statutory mechanism. The agency is already operating within the remedial phase it pretends has not begun. Thus, the illusion of "no plans" offers no protection, no good-faith assurance, and certainly no mootness. The harm is ongoing; the controversy is live; and the State's attempted stipulation, built on an invalid classification, cannot neutralize a violation that persists by its very existence.

Actual and Ongoing Imminent Harm

In contrast to the State's confused wording, the reality of imminent harm is neither speculative nor contrived—it is actively unfolding. The Department's refusal to produce classification-related records under FOIL, while simultaneously proceeding under a "Class 2 significant threat" narrative, constitutes an ongoing deprivation of Petitioner's due process rights. The agency's conduct—publicly disseminating an unreviewed and erroneous classification, engaging with contractors, and maintaining the threat of forced entry under color of authority—creates a continuous and imminent danger to Petitioner's property interests, reputation, and legal position.

The harm is not hypothetical; it is the *process itself* that is harmful. Each day that the misclassification remains uncorrected and publicly endorsed, the stigma and market damage deepen. Each act of procedural concealment compounds the injury. That is the

essence of *irreparable harm*—the kind that cannot be undone by money or remedied retroactively. The Attorney General's careless assertion of a "lack of an imminent harm" is therefore not only linguistically flawed but factually false and legally untenable.

Not drastic

The third paragraph begins with a telling concession. In acknowledging the "statutory notice requirements" that would "give petitioner sufficient time to seek the Court's assistance," the Attorney General implicitly affirms that the Department's statutory authority is conditioned upon—and limited by—those very procedural safeguards. That admission is critical: statutory notice is not a courtesy; it is the jurisdictional gateway to lawful action. Once acknowledged, it cannot be brushed aside with a hypothetical "even if." The Department cannot simultaneously claim statutory authority and disregard the procedural preconditions that give that authority legitimacy.

From that point forward, the argument collapses into boilerplate. The citation parade to *CPLR 6301* and generalized warnings that a TRO is a "drastic remedy" to be used "sparingly" are lifted wholesale from template opposition briefs and applied here without regard to the facts. This case is the textbook instance where a TRO is not only permissible but essential. The harm at issue is not speculative—it is ongoing and demonstrable: the Department's unlawful classification remains publicly posted, its FOIL concealments persist, its communications with contractors and local media continue, and its procedural violations remain unremedied. That continuous misconduct satisfies the statutory threshold of "immediate and irreparable injury, loss or damage" under CPLR 6301. To deny relief on the grounds that TROs are "drastic" would invert the

statute's purpose—reserving judicial restraint precisely for moments when a state agency's ongoing, ultra vires conduct threatens rights that cannot later be restored.

This case falls squarely within that category. Far from being premature or drastic, the requested TRO represents the narrowest possible judicial intervention necessary to preserve the status quo and prevent further state-inflicted harm pending adjudication on the merits. The State's invocation of general cautionary language does not rebut the record—it only reveals that, lacking a factual defense, counsel has resorted to boilerplate platitudes that bear no resemblance to the concrete pattern of injury now before the Court.

The State's reliance on *Town of Southeast v. Gonnella* (26 AD2d 550 [2d Dept 1966]) and similar cases only underscores its detachment from the governing context. *Gonnella* involved private litigants in a zoning dispute, not a state agency wielding statutory power under color of law. The court's caution there—that a TRO should not issue absent a clear and undisputed right—has no bearing where the dispute involves an administrative agency accused of ongoing statutory violations and due process deprivations. By contrast, in *Matter of Adirondack Wild: Friends of the Forest Preserve v. N.Y.S. Dept. of Envtl. Conservation* (2019 NY Slip Op 29384 [Sup Ct, Albany County 2019]), the court granted a TRO to restrain DEC from continuing unauthorized activity notwithstanding pending judicial review. That case is not an outlier; it illustrates that when the Department proceeds outside the bounds of law while litigation is pending, judicial restraint is not "drastic"—it is indispensable. The same institutional posture exists here. The Department's conduct has already entered the remedial phase without satisfying the statutory predicates or disclosing the record of classification that

underpins its authority. Under such conditions, CPLR 6301 is designed precisely to intercede. The State's cut-and-paste invocation of cautionary language does nothing to mask that reality.

Irreparable harm confession

The sentence, "There is no imminent threat of an irreparable harm," is self-defeating on its face. By acknowledging a "threat of an irreparable harm," the Attorney General implicitly concedes the very element his argument seeks to deny—*irreparable harm itself.* His attempt to qualify that threat as "not imminent" collapses under scrutiny, for once a threat of irreparable harm is admitted, its timing becomes a question of degree, not existence. Moreover, the construction "an irreparable harm" is not recognized in either English or law. "Irreparable harm" is a singular legal condition, not a countable noun. To speak of "an" irreparable harm is to betray a fundamental misunderstanding of the doctrine codified in CPLR 6301, which turns precisely on the presence of ongoing or impending injury that cannot later be redressed.

Here, the record demonstrates that harm of an irreparable character not only *threatens* but *persists.* The Department's unlawful "significant threat" classification remains active, its FOIL violations ongoing, and its reputational and procedural injuries cumulative. Each day that the misclassification stands uncorrected deepens the prejudice against Petitioner, perpetuating exactly the kind of continuing harm that CPLR 6301 exists to restrain. In attempting to deny the element of imminence through linguistic sleight, the State has inadvertently confirmed the element of irreparability—and, in doing so, satisfied the very standard it invokes to oppose relief.

Indispensable procedural steps

The statement that “any remedial action the Department might take requires several preliminary steps” is not exculpatory—it is **self-incriminating**. In that sentence, the State implicitly admits that statutory authority to act arises only after those “preliminary steps” are properly completed and documented. Those steps—preparation of a workplan under DER-10 §5.2, issuance of notice under ECL §27-1313(4), and coordination with the property owner—constitute the procedural foundation for any lawful remedial action. Yet the Department has produced no record showing that such steps were followed, noticed, or even commenced in accordance with law. Thus, the Attorney General’s own words confirm the existence of a record that must exist if the agency’s actions are legitimate—while simultaneously refusing to acknowledge or produce it. That contradiction exposes the heart of this dispute: the Department purports to exercise statutory authority while concealing the very documentation that would demonstrate compliance with the statute.

What the State offers as reassurance—“that any remedial action requires several preliminary steps”—is, in fact, an inadvertent admission that those steps are indispensable, and their absence is fatal. It is not Petitioner’s fear that is unfounded; it is the Department’s claim of authority that is. Until those preliminary steps are demonstrated in the record, any action—planned, pending, or publicized—is ultra vires. The State cannot hide behind statutory procedure while refusing to show it complied with that same procedure.

Plaintiff NOT responsible

The collapse in accuracy deepens as the Attorney General, in paragraph 4, continues the misclassification trend regarding Petitioner's legal status—contradicting the Department's own September 5th **Order on Consent**, which expressly identifies, even though illegitimately and without lawful authority, Petitioner as a *Potentially Responsible Party (PRP)* under ECL Article 27. Thus no valid classification under ECL § 27-1313, no confirmed source of contamination as required by the 2013 MACTEC report, and thus no statutory basis to reach even potential liability; without a lawful source determination, no responsibility—actual or potential—can attach (*see Charles A. Field Delivery Serv., Inc. v. Roberts*, 66 N.Y.2d 516 [1985]; *Matter of McCormack v. Axelrod*, 59 N.Y.2d 574 [1983]).

Without any hearing, without notice, and without the very "preliminary steps" that the State just acknowledged are prerequisites to lawful remedial authority, the Attorney General now reclassifies Petitioner as a *responsible party* outright. This is not a harmless slip; it is a fatal misstatement that reveals the same bureaucratic disease underlying the broader misclassification crisis within the Department. It exemplifies how, through casual disregard for statutory definitions and procedural safeguards, the State's lawyers transmute conditional liability into established guilt—erasing due process by grammar, defaming a lawful resident of the State of New York and citizen of the United States.

This misidentification cannot be dismissed as carelessness; it reflects a deeper institutional rot. The DEC's pattern of procedural short-circuiting—misclassifying my site,

concealing FOIL records, and preemptively assigning culpability—has become systemic. When the State's chief legal officer cannot accurately represent a party's status as defined in the agency's own governing order, it demonstrates that the machinery of misclassification has metastasized into the litigation itself. The Attorney General's office, instead of correcting the agency's unlawful presumptions, now replicates them before this Court, perpetuating the same fundamental error that gave rise to this proceeding. That error is not procedural—it is constitutional, cutting at the heart of due process, property rights, and public trust.

Straw man

The argument that Petitioner "appears to be afraid that the Department will hire contractors to remediate his contaminated property" is a textbook *straw man*, divorced from the record and from reality. Petitioner has never alleged that remediation, as such, would harm him. The harm arises from the *unlawful assertion of state power* — the Department's attempt to exercise statutory authority it does not possess, under a misclassification it refuses to address, justify or disclose. The injury is not the prospect of environmental restoration but the seizure of control over private property and reputation under a false legal premise. To recast that constitutional grievance as "fear of cleanup" is intellectually dishonest and legally meaningless.

The Department's conduct constitutes ongoing deprivation of due process, not an objection to environmental health. When an agency acts *ultra vires* — without satisfying the statutory prerequisites to jurisdiction — every step it takes under that defective authority inflicts irreparable harm by eroding the rule of law and depriving the property

owner of procedural protection. The Court of Appeals has long recognized that the abuse of statutory authority itself constitutes injury of a kind that no later damages award can cure. (*See*, *Adirondack Wild v. DEC*, 2019 NY Slip Op 29384 [Sup Ct, Albany County 2019].) To trivialize this constitutional violation as "fear of remediation" is to reduce unlawful state action to a caricature. The Attorney General's argument thus collapses under its own falsity: it rebuts a position Petitioner never took, while leaving wholly unanswered the one he actually did — that ongoing, unlawful agency conduct under a void classification constitutes immediate and irreparable harm under CPLR 6301.

Fearmongering

The only real fear present in this case is not Petitioner's—it is the fear the Department itself has deliberately sown in the community. By publicly branding Petitioner's property as a "significant threat" under a misclassification unsupported by law or record, the DEC has manufactured alarm and stigma, weaponizing public perception to justify its overreach. The agency's premature and unlawful declaration, amplified through media outlets and official postings, has instilled anxiety in residents, tarnished Petitioner's reputation, and devalued his property—all before any lawful determination or hearing. That is the true harm: a state agency wielding its authority not to protect the public, but to manipulate it, forging a narrative of danger where none was lawfully found. The resulting climate of fear is not incidental—it is the predictable consequence of the DEC's disregard for process and truth.

Final appeal to authority fallacy

The Attorney General's final argument collapses under the weight of its own circularity. He invokes CPLR 6313(a) to claim that "no temporary restraining order may be granted against a public officer to restrain the performance of statutory duties," yet that protection presupposes the conduct in question is *lawful*. Unlawful action cannot be shielded by the statute it violates. The Department's authority under ECL §§27-1309 and 27-1313 arises only after proper procedure; classification, notice, and record development—steps the Department has skipped or concealed. To invoke those same provisions as a shield is to invert the law itself. CPLR 6313(a) offers no sanctuary to an agency acting *ultra vires*.

Nor can the State's fallback—that Petitioner may later raise defenses in a cost-recovery (again contradicting Plaintiff's illegitimately defined PRP status, and indicating unprocessed, unspoken and unpublicised determinations and conclusions) action—excuse its present disregard for due process. That argument admits the very danger Petitioner seeks to prevent: the Department acting first and justifying later. The TRO is designed precisely to stop that sequence. Finally, to claim that restraining the Department from altering or disseminating false data would "impede statutory duties" is absurd. The publication of unverified or unlawful records is not a statutory duty; it is the abuse of one. This appeal to authority is not law—it is pretext, an illegitimate invocation of power by an agency that has forfeited its claim to deference through its own misconduct.

This very issue has already been resolved against Assistant Attorney General Buttino's position in *Matter of Adirondack Wild: Friends of the Forest Preserve v. N.Y.S. Department of Environmental Conservation* (2019 NY Slip Op 29384 [Sup Ct, Albany County 2019]). In that case, the court granted a temporary restraining order against the DEC, expressly rejecting the notion that CPLR 6313(a) immunizes a state agency from judicial restraint when its conduct exceeds statutory bounds. The court held that "DEC has continued construction activity … despite pending litigation, and that such activity … will cause immediate and irreparable injury," thereby enjoining the Department to preserve the status quo. The ruling thus **neutralizes the Attorney General's reliance on CPLR 6313(a)** by confirming that *state agencies are not immune from injunctive relief when acting beyond or in disregard of statutory authority.* Where, as here, the Department proceeds under a defective classification, conceals required procedural steps, and asserts authority it has not lawfully obtained, the courts retain both the power and the duty to intervene. *Adirondack Wild* stands as binding persuasive precedent against the very boilerplate defense now repeated by the same office.

IRREPARABLE HARM IS CONCRETE, PRESENT, AND COMPOUNDED DAILY

The State's assertion that petitioner's motion is based on "the lack of an immediate harm" collapses under the evidence now before the Court.

3. **The Harm: Ongoing, Irreparable, and Manufactured**

The harm here is not speculative—it is happening now, today, as we speak:

1. Deprivation of constitutional due process rights of notice and appeal constitute irreparable harm as a matter of law, because such violations inflict injury that cannot be

adequately remedied by monetary damages or later relief, striking at the core of individual liberty and due process (OOC March 6, 2017 and Perfecto Exhibit A,B).

2. Failure to give notice **March 12, 2025**, OOC **September 5th, 2025** deprivation of rights, due process (Exhibits D(emails) & H(OOC))

3. The DEC's resistance and evasion of my **October 26th** "classification" FOIL requests, material to this Rule 78 proceeding - deprivation of rights, due process (Exhibit E)

4. "Significant threat", "browfield cleanup" in the DEC public website, media, starting **2018-2025 : March 12, April 4, April 10, April 18, June 12, July 31, Aug 1, Oct 24**… reputational harm predicated on a false foundation (Exhibit F),

5. Tenant backed out of purchase, then left two weeks after the State's "significant threat" announcement in the media, economic harm (Exhibit G).

6. Negative social media post. Reputational harm contagion(Exhibit I)

7. Assistant Attorney General *Mr. Buttino's* November 7, 2025 Opposition to Petitioner's TRO, page 2, paragraph 2, wherein Respondent's counsel **falsely and defamatorily characterizes Petitioner as a "responsible party"**under ECL Article 27 without any adjudication, notice, or due process—constituting another constitutionally **violative and prejudicial misclassification** contrary to ECL §27-1313(4) and "an irreparable harm!" (Exhibit J)

As every minute passes during this hearing, every hour, day, week, month and year that the false classification remains active, Damocle's sword dangles over my head, inflicting ongoing irreparable injury. That is precisely the harm CPLR § 6301 was written to prevent.

And yet, the Attorney General insists there is "no imminent threat of an irreparable harm." That phrase defeats itself. It concedes both "threat" and "harm" while quibbling over timing. The actual injury is not hypothetical or future—it is continuous and deepening each day the State's inertia drives its unlawful action.

1. **Economic Loss.** Petitioner's tenant terminated his lease on March 27, 2024, just over two weeks after the DEC's public "significant threat" announcement. Loss of rental income and marketability is a direct, unrecoverable injury. That same

tenant had already backed out of the purchase contract on the building that expired the previous year.(Exhibit G)

2. **Reputational Damage.** The Facebook Marketplace exchange (Exhibit E) and continuing local commentary show that the public now associates the property with pollution and danger. Such stigma is irreparable. *Doe v. Axelrod*, 71 N.Y.2d at 490-91.
3. **Constitutional Deprivation.** The DEC's publication of a false classification without notice violated due-process rights protected by the Fourth, Fifth, and Fourteenth Amendments. Each republication of that falsehood perpetuates the harm.(Exhibits D,F,H)
4. **Continuing Administrative Conduct.** By maintaining the erroneous classification on its public registry and failing to issue correction, respondents are *"doing"* and *"suffering to be done"* acts proscribed by § 6301 every day this litigation proceeds.(Exhibits H,I)
5. **Ongoing Irreparable Harm, FOIL Obstruction, and Continuing Due-Process Violations**

   Petitioner further demonstrates ongoing and present violations of due process through Respondents' deliberate obstruction of access to the administrative record directly underlying the challenged classification—an act that itself constitutes *continuing irreparable harm* within the meaning of **CPLR § 6301** ("is doing, or is about to do, or is suffering to be done, an act in violation of the plaintiff's rights"). On October 26th, Petitioner filed a lawful **Freedom of Information Law (FOIL)** request with the Department of Environmental

Conservation, enclosing this Court's **Order to Show Cause** and specifically requesting all electronic communications, memoranda, and deliberative materials relating to the **March 6, 2017 classification of 714 Baldwin Street between** Jan 1 2016-Dec 31st 2017. The Department's response—thirteen trivial "filler" emails consisting of pleasantries about vacations and generic scheduling chatter—was a transparent act of deflection, offering not a single communication related to "classification," "Class 2," or any technical or legal analysis (see **Exhibit F**). The DEC invoked **CPLR § 4503** (attorney–client privilege) and **Public Officers Law § 87(2)(g)** (inter- and intra-agency exemption) to withhold the substantive record. (Exhibit E)

Petitioner timely filed a **FOIL appeal on November 3, 2025**, which remains unanswered, leaving him deprived of the very documents needed to substantiate or refute the agency's decision now before this Court, since there are no public records of a supposed classification that must have taken place in order for the state to reach statutory authority under ECl 27-1309,1313. This refusal to produce responsive records—after being served with the OSC and while this judicial review is active—proves that Respondents continue to "act" and "do" within the meaning of CPLR § 6301, by perpetuating concealment and administrative misconduct during the pendency of litigation. The harm is not theoretical; it is *occurring now*.

The DEC's concealment of classification records directly undermines petitioner's constitutional right to due process and fair adjudication under the **Fourth, Fifth, and Fourteenth Amendments** to the United States Constitution. By obstructing

evidence necessary to defend property rights and to prepare for hearing, the Department effectively deprives petitioner of both liberty and property without due process of law. The resulting reputational stigma, economic injury, and procedural disadvantage are ongoing and irreparable—each day that the agency withholds the classification record, petitioner remains branded as the owner of a "significant threat" site without opportunity to confront the underlying basis.

Access to the deliberative and technical record is not discretionary but **legally mandated** under **6 NYCRR § 375-2.7(b)(6)**, which requires notice and opportunity to respond before the Department may finalize or publicize a classification. The DEC's continued refusal to disclose those materials—despite the pendency of this proceeding—violates that regulation outright and deprives petitioner of the very safeguard that the rule was designed to ensure.

The Department's conduct mirrors the institutional defiance condemned in *Matter of Adirondack Wild: Friends of the Forest Preserve v. N.Y.S. Dept. of Envtl. Conservation*, 2019 NY Slip Op 29384 (Sup Ct, Albany Cnty 2019), where the Court was compelled to issue injunctive relief after the DEC continued agency action during active judicial review. Here, the same arrogance persists: the agency, having already erred in its 2017 misclassification, now resists disclosure of the internal communications that would reveal how that error occurred. One would expect an agency confident in its integrity to eagerly "cough up" the documents to vindicate its process. Instead, the DEC's silence and obstruction speak volumes—proof of ongoing irreparable harm, bad faith, and unconstitutional resistance to judicial authority.

Reputational Injury in the Marketplace

Attached as **Exhibit I** is a screenshot of petitioner's August 10, 2024 Facebook Marketplace listing, where a potential lessee publicly commented, *"Isn't this place extremely polluted?"* This comment reflects the public's acceptance of DEC's false narrative and the reputational contagion now attached to petitioner's property. Such stigmatization constitutes irreparable harm. *Doe v. Axelrod*, 71 N.Y.2d at 490 – 91.

Constitutional and Due-Process Deprivation

The Department's conduct violates fundamental rights secured by the **Fourth**, **Fifth**, and **Fourteenth Amendments**. By publicizing a hazardous classification without prior notice or opportunity to respond, respondents deprived petitioner of property and liberty interests without due process. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Each republication of the false "significant threat" label compounds this constitutional injury.

Harm "Being Done" Within the Meaning of § 6301

Respondents' maintenance of the false record, their ongoing communications with media outlets, and their refusal to retract or correct the misclassification fall squarely within CPLR § 6301's language—**"is doing, threatens, or suffers to be done."** The harm is not hypothetical; it is *occurring now*, and every passing week multiplies the damage to petitioner's standing, livelihood, and property.

DEC's Misclassification and Ultra Vires Conduct

Respondents' authority to act arises solely from compliance with statutory procedure. By issuing and publicizing a Class 2 designation founded on a mistaken identity between petitioner's warehouse and a defunct dry-cleaning operation in Greece, NY, respondents acted **ultra vires** and **ab initio**. Under *Charles A. Field Delivery Serv., Inc. v. Roberts*, 66 N.Y.2d 516 (1985), agency action that fails to follow its own procedural mandates is void and cannot confer jurisdiction. All subsequent acts—including the present public postings—are therefore nullities requiring immediate judicial restraint.

The Appearance of Harm and Judicial Duty

New York courts apply the **appearance-of-harm** threshold, not proof of irreversible damage. *Whalen*, 54 N.Y.2d at 97. Once reputational or constitutional injury appears, interim relief is warranted to preserve the status quo. The Department's own admission that it has "no immediate plans" for physical remediation further underscores that the only active, continuing harm is reputational—visited solely upon petitioner.

Pattern of Unreliable Conduct

The DEC's repeated breaches of notice, premature publicity, and resistance to correction establish a pattern inconsistent with good-faith compliance. Judicial restraint

is therefore essential. *Adirondack Wild v. NYS DEC*, 2019 NY Slip Op 29384 (Sup Ct, Albany County 2019).

Procedural Deflection Fails

Reliance on 22 NYCRR 202.8(c) is misplaced; Article 78 practice and **CPLR § 7805** expressly authorize supplementary affidavits and stays to preserve review. To elevate a page-limit rule over statutory relief would subvert legislative intent.

Equities and Public Interest

Respondents admit they have “no immediate plans” for remediation. Thus, restraint imposes no prejudice, while petitioner continues to suffer escalating damage. Preserving the status quo best serves the public interest in lawful governance.

Relief Requested

Petitioner respectfully renews his request that the Court issue an Order:

1. Temporarily restraining respondents from any physical, administrative, or communicative action concerning 714 Baldwin Street pending determination;
2. Directing preservation of all related records and prohibiting alteration or dissemination; and
3. Granting such other relief as is just and proper under **CPLR §§ 6301 and 7805**.

Footnote – Preservation of Record and Procedural Clarification

To the extent respondents may contend that the supplemental affidavits and exhibits filed herein are "new" or "improper," petitioner notes that this filing is made within the same motion sequence and is governed by CPLR §§ 2214(b) and (c). Those provisions authorize reply affidavits and permit the Court to consider all papers already in its possession relevant to the motion. Under CPLR § 105(u), verified pleadings and affidavits carry the force of sworn testimony. Unrebutted sworn facts are deemed admitted. Matter of McCormack v. Axelrod, 59 N.Y.2d 574 (1983). Accordingly, inclusion of petitioner's supplemental affidavits is procedurally proper and necessary to complete the record.

Respectfully submitted,

Julian Raven, Petitioner, pro se
714 Baldwin St.
Elmira, New York, 14901