

# STATE OF NEW YORK

5612

2017-2018 Regular Sessions

## IN SENATE

April 20, 2017

Introduced by Sens. KRUEGER, HOYLMAN -- read twice and ordered printed,  
and when printed to be committed to the Committee on Environmental  
Conservation

AN ACT to amend the environmental conservation law, in relation to  
enforcement actions for violations of such law

The People of the State of New York, represented in Senate and Assem-  
bly, do enact as follows:

1 Section 1. Article 71 of the environmental conservation law is amended  
2 by adding a new title 45 to read as follows:

3 TITLE 45

4 ENVIRONMENTAL

5 LAW ENFORCEMENT ACT

6 Section 71-4501. Enforcement actions.

7 71-4503. Notice of action.

8 71-4505. Intervention.

9 71-4507. Approval of settlements.

10 71-4509. Costs, fees and penalties.

11 71-4511. Applicability in the Adirondack park.

12 71-4513. Savings clause.

13 § 71-4501. Enforcement actions.

14 1. Except as otherwise provided in section 71-4503 of this title, any  
15 person who has or may suffer an injury in fact, stemming from an alleged  
16 violation, and redressable from the abatement of that violation, may  
17 commence a civil action in a court of competent jurisdiction for injunc-  
18 tive and declaratory relief pursuant to subdivision two of this section  
19 against any person who is alleged to be in violation of any rule, regu-  
20 lation, permit, certificate or order promulgated or issued pursuant to  
21 the following provisions of this chapter:

22 a. section 15-0501, 15-0503 or 15-0505; or

23 b. title 27 of article 15; or

24 c. title 5, 7, 8, 10 or 17 of article 17; or

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 d. article 23; or  
2 e. article 24; or  
3 f. article 25; or  
4 g. title 3, 7, 9 or 13 of article 27; or  
5 h. article 40.

6 2. In any action commenced pursuant to subdivision one of this  
7 section, the court may issue declaratory and/or injunctive relief for  
8 each violation found. The judgment in any such action may also impose  
9 such conditions on the defendant as are necessary to assure compliance  
10 with such law, rule, regulation, permit, certificate or order within a  
11 reasonable time period.

12 3. No person shall commence a civil action pursuant to subdivision one  
13 of this section unless the alleged violation could be subject to a judi-  
14 cial enforcement action or administrative enforcement proceeding brought  
15 by or on behalf of the department, the state of New York, the commis-  
16 sioner, or the commissioner's designee.

17 4. No action may be brought against the state or any of its depart-  
18 ments, agencies or bureaus or any of its political subdivisions or any  
19 public authority pursuant to this title except in their capacity as  
20 owner or operator of a pollution source or as a person responsible for  
21 the investigation or remediation of an inactive hazardous waste disposal  
22 site pursuant to title thirteen of article twenty-seven of this chapter.  
23 § 71-4503. Notice of action.

24 1. Except as provided in subdivision two of this section, no action  
25 may be commenced under subdivision one of section 71-4501 of this title:

26 a. prior to sixty days after written notice by certified mail, return  
27 receipt requested, has been given by the plaintiff to the commissioner,  
28 the attorney general, and any person alleged to be in violation of any  
29 law, rule, regulation, permit, certificate or order. Such written notice  
30 shall be given in such a manner as the commissioner may prescribe by  
31 regulation, and shall identify any person alleged to be in violation of  
32 any such law, rule, regulation, permit, certificate or order as set  
33 forth in subdivision one of section 71-4501 of this title and shall  
34 describe with reasonable particularity the activity or condition  
35 complained of including, where appropriate, data or test results in the  
36 possession of the plaintiff which describe such alleged violation; or

37 b. if the commissioner or the commissioner's designee, at any time  
38 prior to the end of the sixty day notice period prescribed in paragraph  
39 a of this subdivision or prior to commencement of such action, whichever  
40 is later and upon written notice to the person who provided the notice  
41 prescribed in paragraph a of this subdivision, has commenced and is  
42 diligently prosecuting an administrative enforcement proceeding pursuant  
43 to this chapter to abate the alleged violation; or

44 c. if the attorney general, at any time prior to the end of the sixty  
45 day notice period prescribed in paragraph a of this subdivision or prior  
46 to commencement of such action, whichever is later, and upon written  
47 notice to the person who provided the notice prescribed in paragraph a  
48 of this subdivision, has commenced and is diligently prosecuting a civil  
49 action in a court of the United States or New York state which seeks an  
50 order or injunction to abate the alleged violation; or

51 d. if the alleged violation is the subject of a consent order, a  
52 court order or any other written agreement signed by the commissioner or  
53 the commissioner's designee and the alleged violator setting forth a  
54 compliance schedule to eliminate the alleged violation in a reasonable  
55 time period, or of a settlement or disposition of an administrative  
56 enforcement proceeding or a civil action commenced pursuant to this

1 chapter, provided that the alleged violator is in compliance with the  
2 terms of such consent order, court order, agreement, settlement or  
3 disposition.

4 2. The plaintiff may commence an action under subdivision one of  
5 section 71-4501 of this title prior to sixty days after the giving of  
6 notice required by paragraph a of subdivision one of this section upon a  
7 showing to the court that the matter in controversy involves a substan-  
8 tial and imminent hazard to health or the environment.

9 3. A copy of the summons and complaint and any amendment thereto,  
10 shall be served upon the commissioner and the attorney general.  
11 § 71-4505. Intervention.

12 1. The state as represented by the attorney general may intervene as a  
13 matter of right in any action brought pursuant to this title.

14 2. Any person who is authorized to commence an action pursuant to  
15 section 71-4501 of this title and who has given notice pursuant to  
16 section 71-4503 of this title may intervene upon timely motion as a  
17 matter of right in any action or proceeding subsequently commenced by  
18 the department or the attorney general relating to any violation alleged  
19 in such notice.

20 § 71-4507. Approval of settlements.

21 1. No action commenced under this title shall be settled except upon  
22 approval by the court upon sixty days notice to all parties, the commis-  
23 sioner and the attorney general. Notice of the proposed settlement shall  
24 be published in the environmental notice bulletin by the commissioner.  
25 Upon the motion of the commissioner, the attorney general, or any other  
26 party or upon its own motion, the court may require such further notice  
27 as may be required to protect the environment or persons who are not a  
28 party to the action. The court shall not approve a settlement in an  
29 action commenced under this title if the court determines that a mone-  
30 tary settlement in excess of costs, disbursements and reasonable expert  
31 witness and attorney fees has been offered or paid by a defendant as  
32 consideration for such settlement to a plaintiff who has standing to sue  
33 only by virtue of this title.

34 2. If, subsequent to the commencement of an action under subdivision  
35 one of section 71-4501 of this title which action has not been finally  
36 adjudicated, the person alleged to be in violation of any law, rule,  
37 regulation, permit, certificate or order enters into a consent order, or  
38 is subject to a court order or other written agreement signed by the  
39 commissioner or the commissioner's designee which sets forth a reason-  
40 able settlement and disposition of the alleged violation, the court in  
41 which such action is pending, on motion of any party, may make an appro-  
42 priate court order disposing of the case, including the award of costs,  
43 disbursements, reasonable expert witness and attorney fees to any party  
44 if appropriate pursuant to section 71-4509 of this title.

45 § 71-4509. Costs, fees and penalties.

46 1. The court, in issuing any final order in any action brought pursu-  
47 ant to subdivisions one and two of section 71-4503 of this title may in  
48 its discretion award costs, disbursements and reasonable expert witness  
49 and attorney fees to any prevailing or substantially prevailing party;  
50 provided, however, that a prevailing or substantially prevailing  
51 respondent or defendant must show that the action or claim brought was  
52 frivolous in order to recover such costs, disbursements, reasonable  
53 expert witness and attorney fees. In order to find the action or claim  
54 to be frivolous, the court must find in writing one or more of the  
55 following:

1 a. the action or claim was commenced, used or continued in bad faith,  
2 solely to delay or prolong the resolution of the litigation or to harass  
3 or maliciously injure another;

4 b. the action or claim was commenced or continued in bad faith without  
5 any reasonable basis in law or fact and could not be supported by a good  
6 faith argument for an extension, modification or reversal of existing  
7 law. If the action or claim was promptly discontinued when the party or  
8 the attorney learned or should have learned that the action or claim  
9 lacked such a reasonable basis, the court may find that the party or the  
10 attorney did not act in bad faith.

11 2. Notwithstanding the provisions of subdivision one of this section,  
12 no costs, disbursements, or reasonable expert witness and attorney fees  
13 may be awarded against the state, or any of its departments, agencies,  
14 bureaus or any of its political subdivisions, or any public authority in  
15 any action brought under this title.

16 3. In addition to the state's right to intervene pursuant to subdivi-  
17 sion one of section 71-4505 of this title or any other law, the state,  
18 as represented by the attorney general, may appear upon timely motion in  
19 an action brought under this title for the sole purpose of obtaining an  
20 award of penalties against any person found liable in such action;  
21 provided, however, that the plaintiff and defendant must be notified of  
22 the state's intent to move for penalties within thirty days of commence-  
23 ment of such action. Any claim for penalties based upon a violation  
24 which is the subject of an action brought under this title must be  
25 brought in such action.

26 § 71-4511. Applicability in the Adirondack park.

27 With respect to those parts of title twenty-seven of article fifteen  
28 of this chapter and those parts of article twenty-four of this chapter  
29 administered by the Adirondack park agency created pursuant to article  
30 twenty-seven of the executive law, any reference in this title to the  
31 department, the commissioner, or the commissioner's designee shall be  
32 construed to mean the Adirondack park agency.

33 § 71-4513. Savings clause.

34 Nothing in this title shall restrict any right which any person or  
35 class of persons may have under any statute or common law to seek  
36 enforcement of any statute, rule, regulation, permit, certificate or  
37 order, or to seek any other relief.

38 § 2. Section 71-1311 of the environmental conservation law, subdivi-  
39 sion 1 as amended by chapter 846 of the laws of 1981, is amended to read  
40 as follows:

41 § 71-1311. Injunction against violations.

42 [~~1.~~] Whenever it appears that any person is violating or threatening  
43 to violate any provision of article 23 of this chapter or is committing  
44 any offense described in section 71-1305 of this title, the department,  
45 acting by the Attorney General, may bring suit against such person in  
46 any court of competent jurisdiction to restrain such person from contin-  
47 uing such violation or from carrying out the threat of violation. In any  
48 such suit, the court shall have jurisdiction to grant to the department  
49 without bond or other undertaking, such prohibitory or mandatory injunc-  
50 tions as the facts may warrant, including temporary restraining orders  
51 and preliminary injunctions.

52 [~~2. If the department, acting by the Attorney General, shall fail to~~  
53 ~~bring suit to enjoin a violation or threatened violation of any~~  
54 ~~provision of article 23, or any rule, regulation, or order of the~~  
55 ~~department made pursuant hereto, within ten days after receipt of writ-~~  
56 ~~ten request to do so by any person who is or will be adversely affected~~

~~1 by such violation, the person making such request may bring suit in his  
2 own behalf to restrain such violation or threatened violation in any  
3 court in which the department might have brought suit. The department  
4 shall be made a party in such suit in addition to the person violating  
5 or threatening to violate a provision of article 23, or a rule, regu-  
6 lation, or order of the department, and the action shall proceed and  
7 injunctive relief may be granted to the department without bond, or  
8 other undertaking in the same manner as if suit had been brought by the  
9 department.]~~

10 § 3. This act shall take effect immediately; provided however, that no  
11 action authorized by section 71-4501 of the environmental conservation  
12 law, as added by section one of this act, may be commenced against any  
13 city, village, town or county prior to September 1, 2022 and nothing in  
14 this act shall affect any action commenced pursuant to section 71-1311  
15 of the environmental conservation law, prior to such effective date.