S T A T E O F N E W Y O R K

3967

2009-2010 Regular Sessions

I N S E N A T E

April 7, 2009

Introduced by Sen. OPPENHEIMER -- 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 granting private citizens the right to initiate civil enforcement actions for violations of such law

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

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

TITLE 45

PRIVATE ENVIRONMENTAL LAW ENFORCEMENT ACT

SECTION 71-4501. ENFORCEMENT BY PRIVATE CITIZENS.
71-4503. NOTICE OF ACTION.
71-4505. INTERVENTION.
71-4507. APPROVAL OF SETTLEMENTS.
71-4509. COSTS, FEES, AND PENALTIES.
71-4511. APPLICABILITY IN THE ADIRONDACK PARK.
71-4513. SAVINGS CLAUSE.

S 71-4501. ENFORCEMENT BY PRIVATE CITIZENS.

1. EXCEPT AS OTHERWISE PROVIDED IN SECTION 71-4503 OF THIS TITLE, ANY PERSON WHO HAS SUFFERED OR MAY SUFFER AN INJURY IN FACT, REGARDLESS OF WHETHER SUCH INJURY IS DIFFERENT IN KIND OR DEGREE FROM THAT SUFFERED BY THE PUBLIC AT LARGE, MAY COMMENCE A CIVIL ACTION IN A COURT OF COMPETENT JURISDICTION FOR INJUNCTIVE AND DECLARATORY RELIEF PURSUANT TO SUBDIVISION TWO OF THIS SECTION AGAINST ANY PERSON FOR ANY VIOLATION OF AN ADMINISTRATIVE OR COURT ORDER COMPELLING THAT PERSON TO INVESTIGATE OR REMEDIATE AN INACTIVE HAZARDOUS WASTE DISPOSAL SITE PURSUANT TO TITLE THIRTEEN OF ARTICLE TWENTY-SEVEN OF THIS CHAPTER OR FOR A VIOLATION OF

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

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THE FOLLOWING PROVISIONS OF OR ANY RULE, REGULATION, PERMIT, CERTIFICATE, OR ORDER PROMULGATED OR ISSUED PURSUANT TO:

A. SECTION 15-0501, 15-0503 OR 15-0505 OF TITLE FIVE OF ARTICLE FIFTEEN OF THIS CHAPTER; OR

B. TITLE TWENTY-SEVEN OF ARTICLE FIFTEEN OF THIS CHAPTER; OR

C. TITLE FIVE, SEVEN, EIGHT, TEN OR SEVENTEEN OF ARTICLE SEVENTEEN OF THIS CHAPTER; OR

D. ARTICLE NINETEEN OF THIS CHAPTER; OR

E. ARTICLE TWENTY-THREE OF THIS CHAPTER; OR

F. ARTICLE TWENTY-FOUR OF THIS CHAPTER; OR

G. ARTICLE TWENTY-FIVE OF THIS CHAPTER; OR

H. TITLE THREE, SEVEN, NINE OR FIFTEEN OF ARTICLE TWENTY-SEVEN OF THIS CHAPTER; OR

I. ARTICLE THIRTY-THREE OF THIS CHAPTER; OR

J. ARTICLE THIRTY-SEVEN OF THIS CHAPTER; OR

K. ARTICLE FORTY OF THIS CHAPTER.

2. IN ANY ACTION COMMENCED PURSUANT TO SUBDIVISION ONE OF THIS SECTION, THE COURT MAY ISSUE DECLARATORY OR INJUNCTIVE RELIEF OR BOTH FOR EACH VIOLATION FOUND. THE JUDGMENT IN ANY SUCH ACTION MAY ALSO IMPOSE SUCH CONDITIONS ON THE DEFENDANT AS ARE NECESSARY TO ENSURE COMPLIANCE WITH SUCH LAW, RULE, REGULATION, PERMIT, CERTIFICATE, OR ORDER WITHIN A REASONABLE TIME PERIOD.

3. NO PERSON SHALL COMMENCE A CIVIL ACTION PURSUANT TO SUBDIVISION ONE OF THIS SECTION UNLESS THE ALLEGED VIOLATION COULD BE SUBJECT TO A JUDICIAL ENFORCEMENT ACTION OR ADMINISTRATIVE ENFORCEMENT PROCEEDING BROUGHT BY OR ON BEHALF OF THE DEPARTMENT, THE STATE OF NEW YORK, THE COMMISSIONER, OR THE COMMISSIONER'S DESIGNEE.

4. NO ACTION MAY BE BROUGHT AGAINST THE STATE OR ANY OF ITS DEPARTMENTS, AGENCIES, OR BUREAUS OR ANY OF ITS POLITICAL SUBDIVISIONS OR ANY PUBLIC AUTHORITY PURSUANT TO THIS TITLE EXCEPT IN THEIR CAPACITY AS OWNER OR OPERATOR OF A POLLUTION SOURCE OR AS A PERSON RESPONSIBLE FOR THE INVESTIGATION OR REMEDIATION OF AN INACTIVE HAZARDOUS WASTE DISPOSAL SITE PURSUANT TO TITLE THIRTEEN OF ARTICLE TWENTY-SEVEN OF THIS CHAPTER.

S 71-4503. NOTICE OF ACTION.

1. EXCEPT AS PROVIDED IN SUBDIVISION TWO OF THIS SECTION, NO ACTION MAY BE COMMENCED UNDER SUBDIVISION ONE OF SECTION 71-4501 OF THIS TITLE:

A. PRIOR TO SIXTY DAYS AFTER WRITTEN NOTICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, HAS BEEN GIVEN BY THE PLAINTIFF TO THE COMMISSIONER, THE ATTORNEY GENERAL, AND ANY PERSON ALLEGED TO BE IN VIOLATION OF ANY LAW, RULE, REGULATION, PERMIT, CERTIFICATE, OR ORDER. SUCH WRITTEN NOTICE SHALL BE GIVEN IN SUCH A MANNER AS THE COMMISSIONER MAY PRESCRIBE BY REGULATION AND SHALL IDENTIFY ANY PERSON ALLEGED TO BE IN VIOLATION OF ANY SUCH LAW, RULE, REGULATION, PERMIT, CERTIFICATE, OR ORDER AS SET FORTH IN SUBDIVISION ONE OF SECTION 71-4501 OF THIS TITLE AND SHALL DESCRIBE WITH REASONABLE PARTICULARITY THE ACTIVITY OR CONDITION COMPLAINED OF INCLUDING, WHERE APPROPRIATE, DATA OR TEST RESULTS IN THE POSSESSION OF THE PLAINTIFF WHICH DESCRIBE SUCH ALLEGED VIOLATION; OR

B. IF THE COMMISSIONER OR HIS OR HER DESIGNEE, AT ANY TIME PRIOR TO THE END OF THE SIXTY DAY NOTICE PERIOD PRESCRIBED IN PARAGRAPH A OF THIS SUBDIVISION OR PRIOR TO COMMENCEMENT OF SUCH ACTION, WHICHEVER IS LATER, AND UPON WRITTEN NOTICE TO THE PERSON WHO PROVIDED THE NOTICE PRESCRIBED IN PARAGRAPH A OF THIS SUBDIVISION, HAS COMMENCED AND IS ACTIVELY PROSECUTING AN ADMINISTRATIVE ENFORCEMENT PROCEEDING PURSUANT TO THIS CHAPTER RELATIVE TO THE ALLEGED VIOLATION; OR

C. IF THE ATTORNEY GENERAL, AT ANY TIME PRIOR TO THE END OF THE SIXTY DAY NOTICE PERIOD PRESCRIBED IN PARAGRAPH A OF THIS SUBDIVISION OR PRIOR

TO COMMENCEMENT OF SUCH ACTION, WHICHEVER IS LATER, AND UPON WRITTEN NOTICE TO THE PERSON WHO PROVIDED THE NOTICE PRESCRIBED IN PARAGRAPH A OF THIS SUBDIVISION, HAS COMMENCED AND IS ACTIVELY PROSECUTING A CIVIL ACTION IN A COURT OF THE UNITED STATES OR NEW YORK STATE WHICH SEEKS AN ORDER OR INJUNCTION RELATIVE TO THE ALLEGED VIOLATION; OR

D. IF THE ALLEGED VIOLATION IS THE SUBJECT OF A CONSENT ORDER, A COURT ORDER, OR ANY OTHER WRITTEN AGREEMENT SIGNED BY THE COMMISSIONER OR THE COMMISSIONER'S DESIGNEE AND THE ALLEGED VIOLATOR SETTING FORTH A COMPLIANCE SCHEDULE TO ELIMINATE THE ALLEGED VIOLATION IN A REASONABLE TIME PERIOD, OR OF A SETTLEMENT OR DISPOSITION OF AN ADMINISTRATIVE ENFORCEMENT PROCEEDING OR A CIVIL ACTION COMMENCED PURSUANT TO THIS CHAPTER; PROVIDED THAT THE ALLEGED VIOLATOR IS IN COMPLIANCE WITH THE TERMS OF SUCH CONSENT ORDER, COURT ORDER, AGREEMENT, SETTLEMENT, OR DISPOSITION.

2. THE PLAINTIFF MAY COMMENCE AN ACTION UNDER SUBDIVISION ONE OF SECTION 71-4501 OF THIS TITLE PRIOR TO SIXTY DAYS AFTER THE GIVING OF NOTICE REQUIRED BY PARAGRAPH A OF SUBDIVISION ONE OF THIS SECTION UPON A SHOWING TO THE COURT THAT THE MATTER IN CONTROVERSY INVOLVES A SUBSTANTIAL AND IMMINENT HAZARD TO THE ENVIRONMENT.

3. A COPY OF THE COMPLAINT AND, UNLESS SERVICE IS THEREAFTER WAIVED, ALL MOTION PAPERS AND ANY SUBSEQUENT PLEADINGS SHALL BE SERVED UPON THE COMMISSIONER, THE ATTORNEY GENERAL, AND THE DEFENDANT.

S 71-4505. INTERVENTION.

1. THE STATE, AS REPRESENTED BY THE ATTORNEY GENERAL, MAY INTERVENE AS A MATTER OF RIGHT IN ANY ACTION BROUGHT PURSUANT TO THIS TITLE.

2. ANY PERSON WHO IS AUTHORIZED TO COMMENCE AN ACTION PURSUANT TO SECTION 71-4501 OF THIS TITLE AND WHO HAS GIVEN NOTICE PURSUANT TO SECTION 71-4503 OF THIS TITLE MAY INTERVENE UPON TIMELY MOTION AS A MATTER OF RIGHT IN ANY ACTION OR PROCEEDING SUBSEQUENTLY COMMENCED BY THE DEPARTMENT OR THE ATTORNEY GENERAL RELATING TO ANY VIOLATION ALLEGED IN SUCH NOTICE.

S 71-4507. APPROVAL OF SETTLEMENTS.

1. NO ACTION COMMENCED UNDER THIS TITLE SHALL BE SETTLED, EXCEPT UPON APPROVAL BY THE COURT UPON SIXTY DAYS' NOTICE TO ALL PARTIES, THE COMMISSIONER, AND THE ATTORNEY GENERAL. NOTICE OF THE PROPOSED SETTLEMENT SHALL BE PUBLISHED IN THE ENVIRONMENTAL NOTICE BULLETIN. UPON THE MOTION OF THE COMMISSIONER, THE ATTORNEY GENERAL, OR ANY OTHER PARTY, OR UPON ITS OWN MOTION, THE COURT MAY REQUIRE SUCH FURTHER NOTICE AS MAY BE REQUIRED TO PROTECT THE INTERESTS IN ENVIRONMENTAL PROTECTION OR ENFORCEMENT OF CITIZENS WHO ARE NOT PARTY TO THE ACTION. THE COURT SHALL NOT APPROVE A SETTLEMENT IN AN ACTION COMMENCED UNDER THIS TITLE IF THE COURT DETERMINES THAT A MONETARY SETTLEMENT IN EXCESS OF COSTS, DISBURSEMENTS, AND REASONABLE EXPERT WITNESSES' AND ATTORNEYS' FEES HAS BEEN OFFERED OR PAID BY A DEFENDANT AS CONSIDERATION FOR SUCH SETTLEMENT TO A PLAINTIFF WHO HAS STANDING TO SUE ONLY BY VIRTUE OF THIS TITLE.

2. IF, SUBSEQUENT TO THE COMMENCEMENT OF AN ACTION UNDER SUBDIVISION ONE OF SECTION 71-4501 OF THIS TITLE WHICH ACTION HAS NOT BEEN FINALLY ADJUDICATED, THE PERSON ALLEGED TO BE IN VIOLATION OF ANY LAW, RULE, REGULATION, PERMIT, CERTIFICATE, OR ORDER ENTERS INTO A CONSENT ORDER OR IS SUBJECT TO A COURT ORDER OR OTHER WRITTEN AGREEMENT SIGNED BY THE COMMISSIONER OR HIS DESIGNEE WHICH SETS FORTH A REASONABLE SETTLEMENT AND DISPOSITION OF THE ALLEGED VIOLATION, THE COURT IN WHICH SUCH ACTION IS PENDING, ON MOTION OF ANY PARTY, MAY MAKE AN APPROPRIATE ORDER DISPOSING OF THE CASE, INCLUDING THE AWARD OF COSTS, DISBURSEMENTS, REASONABLE EXPERT WITNESSES' AND ATTORNEYS' FEES TO ANY PARTY, IF APPROPRIATE PURSUANT TO SECTION 71-4509 OF THIS TITLE.

S 71-4509. COSTS, FEES, AND PENALTIES.

1. THE COURT, IN ISSUING ANY FINAL ORDER IN ANY ACTION BROUGHT PURSUANT TO SUBDIVISIONS ONE AND TWO OF SECTION 71-4503 OF THIS TITLE, MAY IN ITS DISCRETION AWARD COSTS, DISBURSEMENTS, AND REASONABLE EXPERT WITNESSES' AND ATTORNEYS' FEES TO ANY PREVAILING OR SUBSTANTIALLY PREVAILING PARTY; PROVIDED, HOWEVER, THAT SUCH AN AWARD TO A PREVAILING RESPONDENT OR DEFENDANT SHALL NOT EXCEED TEN THOUSAND DOLLARS, AND A PREVAILING RESPONDENT OR DEFENDANT, IN ORDER TO RECOVER SUCH COSTS, DISBURSEMENTS, REASONABLE EXPERT WITNESSES' AND ATTORNEYS' FEES, MUST MAKE A MOTION REQUESTING SUCH COSTS, DISBURSEMENTS, AND FEES AND SHOW THAT THE ACTION OR CLAIM BROUGHT WAS FRIVOLOUS. IN ORDER TO FIND THE ACTION OR CLAIM TO BE FRIVOLOUS, THE COURT MUST FIND IN WRITING ONE OR MORE OF THE FOLLOWING:

A. THE ACTION OR CLAIM WAS COMMENCED, USED, OR CONTINUED IN BAD FAITH, SOLELY TO DELAY OR PROLONG THE RESOLUTION OF THE LITIGATION OR TO HARASS OR MALICIOUSLY INJURE ANOTHER;

B. THE ACTION OR CLAIM WAS COMMENCED OR CONTINUED IN BAD FAITH WITHOUT ANY REASONABLE BASIS IN LAW OR FACT AND COULD NOT BE SUPPORTED BY A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW. IF THE ACTION OR CLAIM WAS PROMPTLY DISCONTINUED WHEN THE PARTY OR THE ATTORNEY LEARNED OR SHOULD HAVE LEARNED THAT THE ACTION OR CLAIM LACKED SUCH A REASONABLE BASIS, THE COURT MAY FIND THAT THE PARTY OR THE ATTORNEY DID NOT ACT IN BAD FAITH.

2. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION, NO COSTS, DISBURSEMENTS, OR REASONABLE EXPERT WITNESSES' AND ATTORNEYS' FEES MAY BE AWARDED AGAINST THE STATE, OR ANY OF ITS DEPARTMENTS, AGENCIES, BUREAUS, OR ANY OF ITS POLITICAL SUBDIVISIONS OR ANY PUBLIC AUTHORITY IN ANY ACTION BROUGHT UNDER THIS TITLE.

3. IN ADDITION TO THE STATE'S RIGHT TO INTERVENE PURSUANT TO SUBDIVISION ONE OF SECTION 71-4505 OF THIS TITLE OR ANY OTHER LAW, THE STATE, AS REPRESENTED BY THE ATTORNEY GENERAL, MAY APPEAR UPON TIMELY MOTION IN AN ACTION BROUGHT UNDER THIS TITLE FOR THE SOLE PURPOSE OF OBTAINING AN AWARD OF PENALTIES AGAINST ANY PERSON FOUND LIABLE IN SUCH ACTION; PROVIDED, HOWEVER, THAT THE PLAINTIFF AND DEFENDANT MUST BE NOTIFIED OF THE STATE'S INTENT TO MOVE FOR PENALTIES WITHIN THIRTY DAYS OF COMMENCEMENT OF SUCH ACTION. ANY CLAIM FOR PENALTIES BASED UPON A VIOLATION WHICH IS THE SUBJECT OF AN ACTION BROUGHT UNDER THIS TITLE MUST BE BROUGHT IN SUCH ACTION.

S 71-4511. APPLICABILITY IN THE ADIRONDACK PARK.

WITH RESPECT TO THOSE PARTS OF TITLE TWENTY-SEVEN OF ARTICLE FIFTEEN OF THIS CHAPTER AND THOSE PARTS OF ARTICLE TWENTY-FOUR OF THIS CHAPTER ADMINISTERED BY THE ADIRONDACK PARK AGENCY CREATED PURSUANT TO ARTICLE TWENTY-SEVEN OF THE EXECUTIVE LAW, ANY REFERENCE IN THIS TITLE TO THE DEPARTMENT, THE COMMISSIONER, OR THE COMMISSIONER'S DESIGNEE SHALL BE CONSTRUED TO MEAN THE ADIRONDACK PARK AGENCY.

S 71-4513. SAVINGS CLAUSE.

NOTHING IN THIS TITLE SHALL RESTRICT ANY RIGHT WHICH ANY PERSON OR CLASS OF PERSONS MAY HAVE UNDER ANY STATUTE OR COMMON LAW TO SEEK ENFORCEMENT OF ANY STATUTE, RULE, REGULATION, PERMIT, CERTIFICATE, OR ORDER OR TO SEEK ANY OTHER RELIEF.

S 2. Section 71-1311 of the environmental conservation law, subdivision 1 as amended by chapter 846 of the laws of 1981, is amended to read as follows:

S 71-1311. Injunction against violations.

[1.] Whenever it appears that any person is violating or threatening to violate any provision of article 23 of this chapter or is committing

any offense described in section 71-1305 of this title, the department, acting by the [Attorney General] ATTORNEY GENERAL, may bring suit against such person in any court of competent jurisdiction to restrain such person from continuing such violation or from carrying out the threat of violation. In any such suit, the court shall have jurisdiction to grant to the department, without bond or other undertaking, such prohibitory or mandatory injunctions as the facts may warrant, including temporary restraining orders and preliminary injunctions.

[2. If the department, acting by the Attorney General, shall fail to bring suit to enjoin a violation or threatened violation of any provision of article 23, or any rule, regulation, or order of the department made pursuant hereto, within ten days after receipt of written request to do so by any person who is or will be adversely affected by such violation, the person making such request may bring suit in his own behalf to restrain such violation or threatened violation in any court in which the department might have brought suit. The department shall be made a party in such suit in addition to the person violating or threatening to violate a provision of article 23, or a rule, regulation, or order of the department, and the action shall proceed and injunctive relief may be granted to the department without bond, or other undertaking in the same manner as if suit had been brought by the department.]

S 3. This act shall take effect immediately; provided however, that no action authorized by section 71-4501 of the environmental conservation law, as added by section one of this act, may be commenced against any city, village, town, or county prior to the first day of September in the year next succeeding the year in which this act shall have become a law, and nothing in this act shall affect any action commenced pursuant to section 71-1311 of the environmental conservation law prior to such contingent date for actions authorized by section 71-4501 of the environmental conservation law.