

2047--A

2013-2014 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2013

Introduced by M. of A. KAVANAGH, COLTON, ENGLEBRIGHT, LUPARDO, JAFFEE, PAULIN, ROSENTHAL, WEPRIN, SWEENEY, ABINANTI -- Multi-Sponsored by -- M. of A. BOYLAND, BRENNAN, CLARK, DINOWITZ, GALEF, GLICK, GOTTFRIED, JACOBS, WEISENBERG, WRIGHT -- read once and referred to the Committee on Environmental Conservation -- recommitted to the Committee on Environmental Conservation in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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:

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 PRIVATE ENVIRONMENTAL

5 LAW ENFORCEMENT ACT

6 SECTION 71-4501. ENFORCEMENT BY PRIVATE CITIZENS.

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 S 71-4501. ENFORCEMENT BY PRIVATE CITIZENS.

14 1. EXCEPT AS OTHERWISE PROVIDED IN SECTION 71-4503 OF THIS TITLE, ANY
15 PERSON WHO HAS SUFFERED OR MAY SUFFER AN INJURY IN FACT, REGARDLESS OF
16 WHETHER SUCH INJURY IS DIFFERENT IN KIND OR DEGREE FROM THAT SUFFERED BY
17 THE PUBLIC AT LARGE, MAY COMMENCE A CIVIL ACTION IN A COURT OF COMPETENT

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

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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 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 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 AND/OR INJUNCTIVE RELIEF FOR EACH VIOLATION FOUND. THE JUDGMENT IN ANY SUCH ACTION MAY ALSO IMPOSE SUCH CONDITIONS ON THE DEFENDANT AS ARE NECESSARY TO ASSURE 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 THE COMMISSIONER'S 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

1 ACTIVELY PROSECUTING AN ADMINISTRATIVE ENFORCEMENT PROCEEDING PURSUANT
2 TO THIS CHAPTER RELATIVE TO THE ALLEGED VIOLATION; OR

3 C. IF THE ATTORNEY GENERAL, AT ANY TIME PRIOR TO THE END OF THE SIXTY
4 DAY NOTICE PERIOD PRESCRIBED IN PARAGRAPH A OF THIS SUBDIVISION OR PRIOR
5 TO COMMENCEMENT OF SUCH ACTION, WHICHEVER IS LATER, AND UPON WRITTEN
6 NOTICE TO THE PERSON WHO PROVIDED THE NOTICE PRESCRIBED IN PARAGRAPH A
7 OF THIS SUBDIVISION, HAS COMMENCED AND IS ACTIVELY PROSECUTING A CIVIL
8 ACTION IN A COURT OF THE UNITED STATES OR NEW YORK STATE WHICH SEEKS AN
9 ORDER OR INJUNCTION RELATIVE TO THE ALLEGED VIOLATION; OR

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

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

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

27 S 71-4505. INTERVENTION.

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

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

36 S 71-4507. APPROVAL OF SETTLEMENTS.

37 1. NO ACTION COMMENCED UNDER THIS TITLE SHALL BE SETTLED EXCEPT UPON
38 APPROVAL BY THE COURT UPON SIXTY DAYS NOTICE TO ALL PARTIES, THE COMMIS-
39 SIONER AND THE ATTORNEY GENERAL. NOTICE OF THE PROPOSED SETTLEMENT SHALL
40 BE PUBLISHED IN THE ENVIRONMENTAL NOTICE BULLETIN. UPON THE MOTION OF
41 THE COMMISSIONER, THE ATTORNEY GENERAL, OR ANY OTHER PARTY OR UPON ITS
42 OWN MOTION, THE COURT MAY REQUIRE SUCH FURTHER NOTICE AS MAY BE REQUIRED
43 TO PROTECT THE INTERESTS IN ENVIRONMENTAL PROTECTION OR ENFORCEMENT OF
44 CITIZENS WHO ARE NOT A PARTY TO THE ACTION. THE COURT SHALL NOT APPROVE
45 A SETTLEMENT IN AN ACTION COMMENCED UNDER THIS TITLE IF THE COURT DETER-
46 MINES THAT A MONETARY SETTLEMENT IN EXCESS OF COSTS, DISBURSEMENTS AND
47 REASONABLE EXPERT WITNESS AND ATTORNEY FEES HAS BEEN OFFERED OR PAID BY
48 A DEFENDANT AS CONSIDERATION FOR SUCH SETTLEMENT TO A PLAINTIFF WHO HAS
49 STANDING TO SUE ONLY BY VIRTUE OF THIS TITLE.

50 2. IF, SUBSEQUENT TO THE COMMENCEMENT OF AN ACTION UNDER SUBDIVISION
51 ONE OF SECTION 71-4501 OF THIS TITLE WHICH ACTION HAS NOT BEEN FINALLY
52 ADJUDICATED, THE PERSON ALLEGED TO BE IN VIOLATION OF ANY LAW, RULE,
53 REGULATION, PERMIT, CERTIFICATE OR ORDER ENTERS INTO A CONSENT ORDER, OR
54 IS SUBJECT TO A COURT ORDER OR OTHER WRITTEN AGREEMENT SIGNED BY THE
55 COMMISSIONER OR THE COMMISSIONER'S DESIGNEE WHICH SETS FORTH A REASON-
56 ABLE SETTLEMENT AND DISPOSITION OF THE ALLEGED VIOLATION, THE COURT IN

1 WHICH SUCH ACTION IS PENDING, ON MOTION OF ANY PARTY, MAY MAKE AN APPRO-
2 PRIATE COURT ORDER DISPOSING OF THE CASE, INCLUDING THE AWARD OF COSTS,
3 DISBURSEMENTS, REASONABLE EXPERT WITNESS AND ATTORNEY FEES TO ANY PARTY
4 IF APPROPRIATE PURSUANT TO SECTION 71-4509 OF THIS TITLE.

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

6 1. THE COURT, IN ISSUING ANY FINAL ORDER IN ANY ACTION BROUGHT PURSU-
7 ANT TO SUBDIVISIONS ONE AND TWO OF SECTION 71-4503 OF THIS TITLE MAY IN
8 ITS DISCRETION AWARD COSTS, DISBURSEMENTS AND REASONABLE EXPERT WITNESS
9 AND ATTORNEY FEES TO ANY PREVAILING OR SUBSTANTIALLY PREVAILING PARTY;
10 PROVIDED, HOWEVER, THAT SUCH AN AWARD TO A PREVAILING RESPONDENT OR
11 DEFENDANT SHALL NOT EXCEED TEN THOUSAND DOLLARS AND A PREVAILING
12 RESPONDENT OR DEFENDANT IN ORDER TO RECOVER SUCH COSTS, DISBURSEMENTS,
13 REASONABLE EXPERT WITNESS AND ATTORNEY FEES MUST MAKE A MOTION REQUEST-
14 ING SUCH COSTS, DISBURSEMENTS AND FEES AND SHOW THAT THE ACTION OR CLAIM
15 BROUGHT WAS FRIVOLOUS. IN ORDER TO FIND THE ACTION OR CLAIM TO BE FRIVO-
16 LOUS, THE COURT MUST FIND IN WRITING ONE OR MORE OF THE FOLLOWING:

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

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

27 2. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION,
28 NO COSTS, DISBURSEMENTS, OR REASONABLE EXPERT WITNESS AND ATTORNEY FEES
29 MAY BE AWARDED AGAINST THE STATE, OR ANY OF ITS DEPARTMENTS, AGENCIES,
30 BUREAUS OR ANY OF ITS POLITICAL SUBDIVISIONS, OR ANY PUBLIC AUTHORITY IN
31 ANY ACTION BROUGHT UNDER THIS TITLE.

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

42 S 71-4511. APPLICABILITY IN THE ADIRONDACK PARK.

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

49 S 71-4513. SAVINGS CLAUSE.

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

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

1 S 71-1311. Injunction against violations.

2 [1.] Whenever it appears that any person is violating or threatening
3 to violate any provision of article 23 of this chapter or is committing
4 any offense described in section 71-1305 of this title, the department,
5 acting by the Attorney General, may bring suit against such person in
6 any court of competent jurisdiction to restrain such person from contin-
7 uing such violation or from carrying out the threat of violation. In any
8 such suit, the court shall have jurisdiction to grant to the department
9 without bond or other undertaking, such prohibitory or mandatory injunc-
10 tions as the facts may warrant, including temporary restraining orders
11 and preliminary injunctions.

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

26 S 3. This act shall take effect immediately; provided however, that no
27 action authorized by section 71-4501 of the environmental conservation
28 law, as added by section one of this act, may be commenced against any
29 city, village, town or county prior to September 1, 2018 and nothing in
30 this act shall affect any action commenced pursuant to section 71-1311
31 of the environmental conservation law prior to such effective date.