

# STATE OF NEW YORK

1811

2017-2018 Regular Sessions

## IN ASSEMBLY

January 13, 2017

Introduced by M. of A. KAVANAGH, COLTON, ENGLEBRIGHT, LUPARDO, JAFFEE, PAULIN, ROSENTHAL, WEPRIN, ABINANTI, FAHY, LIFTON, OTIS, ORTIZ -- Multi-Sponsored by -- M. of A. DINOWITZ, GALEF, GLICK, GOTTFRIED, PERRY -- read once and referred 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.

#### § 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 2 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 13 of

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

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1 article 27 of this chapter, or for a violation of the following  
2 provisions of or any rule, regulation, permit, certificate or order  
3 promulgated or issued pursuant to:

- 4 a. section 15-0501, 15-0503 or 15-0505 of this chapter; or
- 5 b. title 27 of article 15 of this chapter; or
- 6 c. title 5, 7, 8, 10 or 17 of article 17 of this chapter; or
- 7 d. article 19 of this chapter; or
- 8 e. article 23 of this chapter; or
- 9 f. article 24 of this chapter; or
- 10 g. article 25 of this chapter; or
- 11 h. title 3, 7, 9 or 15 of article 27 of this chapter; or
- 12 i. article 33 of this chapter; or
- 13 j. article 37 of this chapter; or
- 14 k. article 40 of this chapter.

15 2. In any action commenced pursuant to subdivision 1 of this section,  
16 the court may issue declaratory and/or injunctive relief for each  
17 violation found. The judgment in any such action may also impose such  
18 conditions on the defendant as are necessary to assure compliance with  
19 such law, rule, regulation, permit, certificate or order within a  
20 reasonable time period.

21 3. No person shall commence a civil action pursuant to subdivision 1  
22 of this section unless the alleged violation could be subject to a judi-  
23 cial enforcement action or administrative enforcement proceeding brought  
24 by or on behalf of the department, the state of New York, the commis-  
25 sioner, or the commissioner's designee.

26 4. No action may be brought against the state or any of its depart-  
27 ments, agencies or bureaus or any of its political subdivisions or any  
28 public authority pursuant to this title except in their capacity as  
29 owner or operator of a pollution source or as a person responsible for  
30 the investigation or remediation of an inactive hazardous waste disposal  
31 site pursuant to title 13 of article 27 of this chapter.

32 § 71-4503. Notice of action.

33 1. Except as provided in subdivision 2 of this section, no action may  
34 be commenced under subdivision 1 of section 71-4501 of this title:

35 a. prior to sixty days after written notice by certified mail, return  
36 receipt requested, has been given by the plaintiff to the commissioner,  
37 the attorney general, and any person alleged to be in violation of any  
38 law, rule, regulation, permit, certificate or order. Such written notice  
39 shall be given in such a manner as the commissioner may prescribe by  
40 regulation, and shall identify any person alleged to be in violation of  
41 any such law, rule, regulation, permit, certificate or order as set  
42 forth in subdivision 1 of section 71-4501 of this title and shall  
43 describe with reasonable particularity the activity or condition  
44 complained of including, where appropriate, data or test results in the  
45 possession of the plaintiff which describe such alleged violation; or

46 b. if the commissioner or the commissioner's designee, at any time  
47 prior to the end of the sixty day notice period prescribed in paragraph  
48 a of this subdivision or prior to commencement of such action, whichever  
49 is later and upon written notice to the person who provided the notice  
50 prescribed in paragraph a of this subdivision, has commenced and is  
51 actively prosecuting an administrative enforcement proceeding pursuant  
52 to this chapter relative to the alleged violation; or

53 c. if the attorney general, at any time prior to the end of the sixty  
54 day notice period prescribed in paragraph a of this subdivision or prior  
55 to commencement of such action, whichever is later, and upon written  
56 notice to the person who provided the notice prescribed in paragraph a

1 of this subdivision, has commenced and is actively prosecuting a civil  
2 action in a court of the United States or New York state which seeks an  
3 order or injunction relative to the alleged violation; or

4 d. if the alleged violation is the subject of a consent order, a  
5 court order or any other written agreement signed by the commissioner or  
6 the commissioner's designee and the alleged violator setting forth a  
7 compliance schedule to eliminate the alleged violation in a reasonable  
8 time period, or of a settlement or disposition of an administrative  
9 enforcement proceeding or a civil action commenced pursuant to this  
10 chapter, provided that the alleged violator is in compliance with the  
11 terms of such consent order, court order, agreement, settlement or  
12 disposition.

13 2. The plaintiff may commence an action under subdivision 1 of section  
14 71-4501 of this title prior to sixty days after the giving of notice  
15 required by paragraph a of subdivision 1 of this section upon a showing  
16 to the court that the matter in controversy involves a substantial and  
17 imminent hazard to the environment.

18 3. A copy of the complaint, and, unless service is thereafter waived,  
19 all motion papers and any subsequent pleadings shall be served upon the  
20 commissioner, the attorney general and the defendant.

21 § 71-4505. Intervention.

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

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

30 § 71-4507. Approval of settlements.

31 1. No action commenced under this title shall be settled except upon  
32 approval by the court upon sixty days notice to all parties, the commis-  
33 sioner and the attorney general. Notice of the proposed settlement shall  
34 be published in the environmental notice bulletin. Upon the motion of  
35 the commissioner, the attorney general, or any other party or upon its  
36 own motion, the court may require such further notice as may be required  
37 to protect the interests in environmental protection or enforcement of  
38 citizens who are not a party to the action. The court shall not approve  
39 a settlement in an action commenced under this title if the court deter-  
40 mines that a monetary settlement in excess of costs, disbursements and  
41 reasonable expert witness and attorney fees has been offered or paid by  
42 a defendant as consideration for such settlement to a plaintiff who has  
43 standing to sue only by virtue of this title.

44 2. If, subsequent to the commencement of an action under subdivision 1  
45 of section 71-4501 of this title which action has not been finally adju-  
46 dicated, the person alleged to be in violation of any law, rule, regu-  
47 lation, permit, certificate or order enters into a consent order, or is  
48 subject to a court order or other written agreement signed by the  
49 commissioner or the commissioner's designee which sets forth a reason-  
50 able settlement and disposition of the alleged violation, the court in  
51 which such action is pending, on motion of any party, may make an appro-  
52 priate court order disposing of the case, including the award of costs,  
53 disbursements, reasonable expert witness and attorney fees to any party  
54 if appropriate pursuant to section 71-4509 of this title.

55 § 71-4509. Costs, fees and penalties.

1 1. The court, in issuing any final order in any action brought pursu-  
2 ant to subdivisions 1 and 2 of section 71-4503 of this title may in its  
3 discretion award costs, disbursements and reasonable expert witness and  
4 attorney fees to any prevailing or substantially prevailing party;  
5 provided, however, that such an award to a prevailing respondent or  
6 defendant shall not exceed ten thousand dollars and a prevailing  
7 respondent or defendant in order to recover such costs, disbursements,  
8 reasonable expert witness and attorney fees must make a motion request-  
9 ing such costs, disbursements and fees and show that the action or claim  
10 brought was frivolous. In order to find the action or claim to be frivo-  
11 lous, the court must find in writing one or more of the following:

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

15 b. the action or claim was commenced or continued in bad faith without  
16 any reasonable basis in law or fact and could not be supported by a good  
17 faith argument for an extension, modification or reversal of existing  
18 law. If the action or claim was promptly discontinued when the party or  
19 the attorney learned or should have learned that the action or claim  
20 lacked such a reasonable basis, the court may find that the party or the  
21 attorney did not act in bad faith.

22 2. Notwithstanding the provisions of subdivision 1 of this section, no  
23 costs, disbursements, or reasonable expert witness and attorney fees may  
24 be awarded against the state, or any of its departments, agencies,  
25 bureaus or any of its political subdivisions, or any public authority in  
26 any action brought under this title.

27 3. In addition to the state's right to intervene pursuant to subdivi-  
28 sion 1 of section 71-4505 of this title or any other law, the state, as  
29 represented by the attorney general, may appear upon timely motion in an  
30 action brought under this title for the sole purpose of obtaining an  
31 award of penalties against any person found liable in such action;  
32 provided, however, that the plaintiff and defendant must be notified of  
33 the state's intent to move for penalties within thirty days of commence-  
34 ment of such action. Any claim for penalties based upon a violation  
35 which is the subject of an action brought under this title must be  
36 brought in such action.

37 § 71-4511. Applicability in the Adirondack park.

38 With respect to those parts of title 27 of article 15 of this chapter  
39 and those parts of article 24 of this chapter administered by the  
40 Adirondack park agency created pursuant to article twenty-seven of the  
41 executive law, any reference in this title to the department, the  
42 commissioner, or the commissioner's designee shall be construed to mean  
43 the Adirondack park agency.

44 § 71-4513. Savings clause.

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

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

52 § 71-1311. Injunction against violations.

53 [1.] Whenever it appears that any person is violating or threatening  
54 to violate any provision of article 23 of this chapter or is committing  
55 any offense described in section 71-1305 of this title, the department,  
56 acting by the Attorney General, may bring suit against such person in

1 any court of competent jurisdiction to restrain such person from contin-  
2 uing such violation or from carrying out the threat of violation. In any  
3 such suit, the court shall have jurisdiction to grant to the department  
4 without bond or other undertaking, such prohibitory or mandatory injunc-  
5 tions as the facts may warrant, including temporary restraining orders  
6 and preliminary injunctions.

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

21 § 3. This act shall take effect immediately; provided however, that no  
22 action authorized by section 71-4501 of the environmental conservation  
23 law, as added by section one of this act, may be commenced against any  
24 city, village, town or county prior to September 1, 2021 and nothing in  
25 this act shall affect any action commenced pursuant to section 71-1311  
26 of the environmental conservation law prior to such effective date.