

# STATE OF NEW YORK

8965

## IN ASSEMBLY

January 9, 2018

Introduced by M. of A. SIMON -- 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:

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 § 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  
18 jurisdiction for injunctive and declaratory relief pursuant to subdivi-  
19 sion 2 of this section against any person for any violation of an admin-  
20 istrative or court order compelling that person to investigate or reme-  
21 diate an inactive hazardous waste disposal site pursuant to title 13 of  
22 article 27 of this chapter, or for a violation of the following  
23 provisions of or any rule, regulation, permit, certificate or order  
24 promulgated or issued pursuant to:

25 a. section 15-0501, 15-0503 or 15-0505 of this chapter; or

26 b. title 27 of article 15 of this chapter; or

27 c. title 5, 7, 8, 10 or 17 of article 17 of this chapter; or

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

LBD02729-01-7

- 1 d. article 19 of this chapter; or
- 2 e. article 23 of this chapter; or
- 3 f. article 24 of this chapter; or
- 4 g. article 25 of this chapter; or
- 5 h. title 3, 7, 9 or 15 of article 27 of this chapter; or
- 6 i. article 33 of this chapter; or
- 7 j. article 37 of this chapter; or
- 8 k. article 40 of this chapter.

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

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

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

26 § 71-4503. Notice of action.

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

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

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

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

54 d. if the alleged violation is the subject of a consent order, a  
 55 court order or any other written agreement signed by the commissioner or  
 56 the commissioner's designee and the alleged violator setting forth a

1 compliance schedule to eliminate the alleged violation in a reasonable  
2 time period, or of a settlement or disposition of an administrative  
3 enforcement proceeding or a civil action commenced pursuant to this  
4 chapter, provided that the alleged violator is in compliance with the  
5 terms of such consent order, court order, agreement, settlement or  
6 disposition.

7 2. The plaintiff may commence an action under subdivision 1 of section  
8 71-4501 of this title prior to sixty days after the giving of notice  
9 required by paragraph a of subdivision 1 of this section upon a showing  
10 to the court that the matter in controversy involves a substantial and  
11 imminent hazard to the environment.

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

15 § 71-4505. Intervention.

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

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

24 § 71-4507. Approval of settlements.

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

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

49 § 71-4509. Costs, fees and penalties.

50 1. The court, in issuing any final order in any action brought pursu-  
51 ant to subdivisions 1 and 2 of section 71-4503 of this title may in its  
52 discretion award costs, disbursements and reasonable expert witness and  
53 attorney fees to any prevailing or substantially prevailing party;  
54 provided, however, that such an award to a prevailing respondent or  
55 defendant shall not exceed ten thousand dollars and a prevailing  
56 respondent or defendant in order to recover such costs, disbursements,

1 reasonable expert witness and attorney fees must make a motion request-  
2 ing such costs, disbursements and fees and show that the action or claim  
3 brought was frivolous. In order to find the action or claim to be frivo-  
4 lous, the court must find in writing one or more of the following:

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

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

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

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

30 § 71-4511. Applicability in the Adirondack park.

31 With respect to those parts of title 27 of article 15 of this chapter  
32 and those parts of article 24 of this chapter administered by the  
33 Adirondack park agency created pursuant to article twenty-seven of the  
34 executive law, any reference in this title to the department, the  
35 commissioner, or the commissioner's designee shall be construed to mean  
36 the Adirondack park agency.

37 § 71-4513. Savings clause.

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

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

45 § 71-1311. Injunction against violations.

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

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

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