

SUMMARY:

S1730-B SCHNEIDERMAN No Same as
SCHNEIDERMAN, DUANE, THOMPSON
Add Art 71 Title 45 SS71-4501 - 71-4513, amd S71-1311, En Con L
Relates to enforcement actions for violations of the environmental conservation law.

BILL TEXT:

STATE OF NEW YORK

1730--B

2009-2010 Regular Sessions

IN SENATE

February 5, 2009

Introduced by Sens. SCHNEIDERMAN, THOMPSON -- read twice and
ordered
printed, and when printed to be committed to the Committee on
Environ-
mental Conservation -- recommitted to the Committee on
Environmental
Conservation in accordance with Senate Rule 6, sec. 8 --
committee
discharged, bill amended, ordered reprinted as amended and
recommitted
to said committee -- committee discharged, bill amended,
ordered
reprinted as amended and recommitted to said committee

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 2 of this
section
19 against any person who is alleged to be in violation of any rule,
regu-

EXPLANATION--Matter in italics (underscored) is new; matter in
brackets

[-] is old law to be omitted.

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S. 1730--B

2

1 lation, permit, certificate or order promulgated or issued pursuant
to
2 the following provisions of this chapter:
3 a. section 15-0501, 15-0503 or 15-0505 of title 5 of article 15; or
4 b. title 27 of article 15; or
5 c. title 5, 7, 8, 10 or 17 of article 17; or
6 d. article 23; or
7 e. article 24; or
8 f. article 25; or
9 g. title 3, 7, 9 or 13 of article 27; or
10 h. article 40.
11 2. In any action commenced pursuant to subdivision 1 of this
section,
12 the court may issue declaratory and/or injunctive relief for
each
13 violation found. The judgment in any such action may also impose
such
14 conditions on the defendant as are necessary to assure compliance
with
15 such law, rule, regulation, permit, certificate or order
within a
16 reasonable time period.
17 3. No person shall commence a civil action pursuant to subdivision
1
18 of this section unless the alleged violation could be subject to a
judi-
19 cial enforcement action or administrative enforcement proceeding
brought
20 by or on behalf of the department, the state of New York, the
commis-
21 sioner, or the commissioner's designee.

22 4. No action may be brought against the state or any of its
depart-
23 ments, agencies or bureaus or any of its political subdivisions or
any
24 public authority pursuant to this title except in their capacity
as
25 owner or operator of a pollution source or as a person responsible
for
26 the investigation or remediation of an inactive hazardous waste
disposal
27 site pursuant to title 13 of article 27 of this chapter.
28 § 71-4503. Notice of action.
29 1. Except as provided in subdivision 2 of this section, no action
may
30 be commenced under subdivision 1 of section 71-4501 of this title:
31 a. prior to sixty days after written notice by certified mail,
return
32 receipt requested, has been given by the plaintiff to the
commissioner,
33 the attorney general, and any person alleged to be in violation of
any
34 law, rule, regulation, permit, certificate or order. Such written
notice
35 shall be given in such a manner as the commissioner may prescribe
by
36 regulation, and shall identify any person alleged to be in violation
of
37 any such law, rule, regulation, permit, certificate or order as
set
38 forth in subdivision one of section 71-4501 of this title and
shall
39 describe with reasonable particularity the activity or
condition
40 complained of including, where appropriate, data or test results in
the
41 possession of the plaintiff which describe such alleged violation; or
42 b. if the commissioner or the commissioner's designee, at any
time
43 prior to the end of the sixty day notice period prescribed in
paragraph
44 a of this subdivision or prior to commencement of such action,
whichever
45 is later and upon written notice to the person who provided the
notice
46 prescribed in paragraph a of this subdivision, has commenced and
is
47 diligently prosecuting an administrative enforcement proceeding
pursuant
48 to this chapter to abate the alleged violation; or
49 c. if the attorney general, at any time prior to the end of the
sixty
50 day notice period prescribed in paragraph a of this subdivision or
prior
51 to commencement of such action, whichever is later, and upon
written
52 notice to the person who provided the notice prescribed in paragraph
a

53 of this subdivision, has commenced and is diligently prosecuting a
civil
54 action in a court of the United States or New York state which seeks
an
55 order or injunction to abate the alleged violation; or
S. 1730--B 3

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

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

15 3. A copy of the summons and complaint and any amendment
thereto,
16 shall be served upon the commissioner and the attorney general.
17 § 71-4505. Intervention.

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

25 in such notice.
26 § 71-4507. Approval of settlements.
27 1. No action commenced under this title shall be settled except
upon
28 approval by the court upon sixty days notice to all parties, the
commis-

29 sioner and the attorney general. Notice of the proposed settlement
shall
30 be published in the environmental notice bulletin by the
commissioner.
31 Upon the motion of the commissioner, the attorney general, or any
other
32 party or upon its own motion, the court may require such further
notice
33 as may be required to protect the environment or persons who are
not a
34 party to the action. The court shall not approve a settlement in
an
35 action commenced under this title if the court determines that a
mone-
36 tary settlement in excess of costs, disbursements and reasonable
expert
37 witness and attorney fees has been offered or paid by a defendant
as
38 consideration for such settlement to a plaintiff who has standing to
sue
39 only by virtue of this title.
40 2. If, subsequent to the commencement of an action under
subdivision 1
41 of section 71-4501 of this title which action has not been finally
adju-
42 dicated, the person alleged to be in violation of any law, rule,
regu-
43 lation, permit, certificate or order enters into a consent order, or
is
44 subject to a court order or other written agreement signed by
the
45 commissioner or the commissioner's designee which sets forth a
reason-
46 able settlement and disposition of the alleged violation, the court
in
47 which such action is pending, on motion of any party, may make an
appro-
48 prate court order disposing of the case, including the award of
costs,
49 disbursements, reasonable expert witness and attorney fees to any
party
50 if appropriate pursuant to section 71-4509 of this title.
51 § 71-4509. Costs, fees and penalties.
52 1. The court, in issuing any final order in any action brought
pursu-
53 ant to subdivisions 1 and 2 of section 71-4503 of this title may in
its
54 discretion award costs, disbursements and reasonable expert witness
and
55 attorney fees to any prevailing or substantially prevailing
party;
56 provided, however, that a prevailing or substantially
prevailing

1 respondent or defendant must show that the action or claim brought
was

2 frivolous in order to recover such costs, disbursements,
reasonable
3 expert witness and attorney fees. In order to find the action or
claim
4 to be frivolous, the court must find in writing one or more of
the
5 following:
6 a. the action or claim was commenced, used or continued in bad
faith,
7 solely to delay or prolong the resolution of the litigation or to
harass
8 or maliciously injure another;
9 b. the action or claim was commenced or continued in bad faith
without
10 any reasonable basis in law or fact and could not be supported by a
good
11 faith argument for an extension, modification or reversal of
existing
12 law. If the action or claim was promptly discontinued when the party
or
13 the attorney learned or should have learned that the action or
claim
14 lacked such a reasonable basis, the court may find that the party or
the
15 attorney did not act in bad faith.
16 2. Notwithstanding the provisions of subdivision 1 of this section,
no
17 costs, disbursements, or reasonable expert witness and attorney fees
may
18 be awarded against the state, or any of its departments,
agencies,
19 bureaus or any of its political subdivisions, or any public authority
in
20 any action brought under this title.
21 3. In addition to the state's right to intervene pursuant to
subdivi-
22 sion 1 of section 71-4505 of this title or any other law, the state,
as
23 represented by the attorney general, may appear upon timely motion in
an
24 action brought under this title for the sole purpose of obtaining
an
25 award of penalties against any person found liable in such
action;
26 provided, however, that the plaintiff and defendant must be notified
of
27 the state's intent to move for penalties within thirty days of
commence-
28 ment of such action. Any claim for penalties based upon a
violation
29 which is the subject of an action brought under this title must
be
30 brought in such action.
31 § 71-4511. Applicability in the Adirondack park.
32 With respect to those parts of title 27 of article 15 of this
chapter

33 and those parts of article 24 of this chapter administered by
the
34 Adirondack park agency created pursuant to article 27 of the
executive
35 law, any reference in this title to the department, the commissioner,
or
36 the commissioner's designee shall be construed to mean the
Adirondack
37 park agency.
38 § 71-4513. Savings clause.
39 Nothing in this title shall restrict any right which any person
or
40 class of persons may have under any statute or common law to
seek
41 enforcement of any statute, rule, regulation, permit, certificate
or
42 order, or to seek any other relief.

43 § 2. Section 71-1311 of the environmental conservation law,
subdivi-

44 sion 1 as amended by chapter 846 of the laws of 1981, is amended to
read

45 as follows:

46 § 71-1311. Injunction against violations.

47 ~~[1.]~~ Whenever it appears that any person is violating or
threatening

48 to violate any provision of article 23 of this chapter or is
committing

49 any offense described in section 71-1305 of this title, the
department,

50 acting by the Attorney General, may bring suit against such person
in

51 any court of competent jurisdiction to restrain such person from
contin-

52 uing such violation or from carrying out the threat of violation. In
any

53 such suit, the court shall have jurisdiction to grant to the
department

54 without bond or other undertaking, such prohibitory or mandatory
injunc-

55 tions as the facts may warrant, including temporary restraining
orders

56 and preliminary injunctions.

S. 1730--B

5

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, 2012 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.